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Supreme Court, U.S.
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Supreme Court of the United States

ESTATE OF TARIK K. RODGERS, by and through the administrators Michael Rodgers and Brenda Rodgers; MICHAEL RODGERS, as parent of the decedent; BRENDA RODGERS, as parent of the decedent,

Petitioners

v.

STEVE SMITH, individually and in his official capacity as Chief of Police of the City of Williamston Police Department, North Carolina; et al

Respondents

PETITION FOR WRIT CERTIORARI

K. Jameson Lawrence
Law Offices of
K. Jameson Lawrence
343 N. Charles St. 2nd Fl.
Baltimore, MD 21201
410-234-3652

José Felipé Anderson, Esquire*
1420 N. Charles Street
Baltimore MD 21201
410-837-4398
**Counsel of Record*

QUESTIONS PRESENTED

I Was the deceased Rodgers seized under the Fourth Amendment when several police officers surrounded him with their vehicles and in person, released a policy dog on him and discharged their weapons at him?

II Did the Fourth Circuit err when in concluding that Rodgers' death, which occurred as a result of police gunfire after a police dog attacked, was reasonable under the Fourth Amendment.

III. Did the Fourth Circuit err when it upheld the District Court's grant of summary judgment, even when the police shooting which caused Rodgers' death occurred under circumstances where the Fourth Circuit concluded Rodgers may have been attempting to surrender to police?

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PARTIES TO THE PROCEEDINGS BELOW

KEITH ROACH, individually and in his official capacity as the Sheriff for Martin County; WALTER J. FARROW III, individually and his official capacity as a Martin County Deputy Sheriff; WILLIAM R. WATERS JR., individually and in his official capacity as a Williamston North Carolina police officer; MELANIE COX, individually and in her official capacity as a Williamston North Carolina police officer; CHARLIE BROWN, individually and in his official capacity as a Williamston North Carolina police officer; ELVIE FORNEY III, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN EDMONDSON, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN HARDISON, individually and in his official capacity as a Williamston North Carolina police officer; TRAVIS COWAN, individually and in his official capacity as a Williamston North Carolina police officer; STACEY PIPPIN, individually and in his capacity as a Williamston North Carolina police officer; DAVID CROSS, indvidually and in his official capacity as a Martin County Deputy Sheriff; THE CITY OF WILLIAMSTON, NORTH CAROLINA.

Respondents

DONNIE PITTMAN, individually and in his official capacity as the County Manger for Martin County, North Carolina; MARTIN COUNTY, NORTH CAROLINA.

Respondents

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STATEMENT OF JURISDICTION

Petitioner, Estate of Tarik K. Rodgers, alleged that various Martin County and City of Williamston police officers; namely Steve Smith, et al., the Respondents used excessive force in effecting the arrest of the Decedent, Tarik K. Rodgers. The Estate of Tarik K. Rodgers brought claims against Steve Smith, et al., under 42 U.S.C. § 1983 for a violation of the Decedent's Fourth Amendment rights. The United States District Court for the Eastern District of North Carolina had jursdiction over Decedent's federal civil rights claims by virtue of 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights action).

The Estate of Tarik K. Rodgers also sought relief from the Respondents for the state law claims of wrongful death and the torts of assault and battery, gross negligence, and, the intentional infliction of emotional distress. The district court had jurisdiction to hear these claims under 28 U.S.C. § 1367(a).

On March 3, 2005, the District Court entered summary judgment in favor of the Respondents on the Estate of Tarik K. Rogers' § 1983, The Estate of Tarik K. Rodgers' state law claims were dismissed pursuant to 42 U.S.C. § 1367(c)(3). The Estate noted a timely appeal to the United State Court of Appeals for the Fourth Circuit. On June 26, 2006 the United States Court of Appeals affirmed the judgment of the District Court. (Pet. App. 2a)

Jurisdiction in this Court is established by 28 U.S.C. § 1291 and 28 U.S.C. § 1331 (Federal Question Jurisdiction).

STATEMENT OF THE CASE

On April 15, 2002, Decedent Tarik K. Rodgers was attacked by a police dog, Officer Brejhar, which was under the custody and control of William R. Waters, Jr., a City of Williamston, North Carolina Police Officer. At the time of the attack, the Decedent was standing outside of his disabled vehicle, with his hands in the air without any weapon therein. Officer Waters admits that he did not give a verbal warning to the Decedent prior to releasing the police dog upon him. (Pet App. 6a-7a) This incident occurred in a residential area in Williamston, North Carolina, and there were several civilian eyewitnesses including the alleged kidnapping victim, Angela Freeman. The Decedent, without provocation and while struggling from the attack of the police dog was shot eight (8) times at point blank range to the head and torso. Throughout the opinion of the Fourth Circuit, a police vehicle video is referenced. That video was a prominent part of all the proceedings below and is available to the Court at anytime it desires to have it available for viewing. The shots perforated Rodgers' heart, brain and lungs, killing him. (Pet.App. 7-8)

On April 4, 2003, the Estate of Tarik K. Rodgers filed a lawsuit in the United States District Court for the Eastern District of North Carolina. That suit included claims against William R. Waters, Jr. and the City of Williamston, North Carolina Police Department, as well as Martin County, Martin County Sheriff Keith Roach, several Police Officers employed by the City of Williamston Police Department and the Martin County Sheriff's Department.

The Petitioner filed the complaint on April 4, 2003,

alleging that following claims: (1) violations of constitutional and civil rights pursuant to 42 U.S.C. § 1983; (2) wrongful death; (3) conspiracy to violate constitutional rights pursuant to 42 U.S.C. § 1985; (4) gross negligence; and (5) assault, battery, and intentional infliction of emotional distress. On April 17, 2003, The Martin County Defendants filed a partial motion to dismiss. On May 30, 2003, the Williamson Defendants filed a partial motion to dismiss. By order of Court dated January 15, 2004 the Court stayed discovery against the City of Williamston and Martin County Sheriffs Department pending the resolution of Defendants qualified immunity defenses.

On March 17, 2004, the District Court issued an order, which dismissed all claims pursuant to Rule 12(b)(6) except for those violations of 42 U.S.C. § 1983 and state law claims for wrongful death, gross negligence, assault, battery and intentional infliction of emotional distress, against the following Defendants: the City of Williamston, Sheriff Roach in his individual and official capacities, and Defendants Smith, Farrow, Waters, Cox, Brown, Forney, McFarlane, Edmondson, Hardison, Cowan, Pippin and Cross in their individual capacities.

On December 1, 2004, the Martin County Defendants (Roach, Farrow, McFarlane, Edmondson, Pippin and Cross) filed a motion for summary judgment. Defendants Smith, Waters, Cox, Brown, Forney, Hardison, Cowan and the City of Williamston ("Williamston Defendants") filed a separate motion for summary judgment on that same day.

On March 3, 2005, the court filed a memorandum opinion and order, which granted summary judgment in favor of all Defendants on the claims, which were filed under § 1983. The court based its decision upon the plaintiff's failure to make out a claim under the substantive due process clause. Having divested itself of pendant jurisdiction, the court dismissed all of the remaining state law claims.

The Estate noted a timely appeal to the United States Court of Appeals for the Fourth Circuit. On June 26, 2006 the United States Court of Appeals affirmed the judgement of the District Court. (Pet.App. 1) Jurisdiction in this Court is established by 28 U.S.C. § 1291 and 28 U.S.C. § 1331 (Federal Question Jurisdiction).

STATEMENT OF FACTS

Decedent Tarik K. Rodgers was a 26-year-old, 5'9", 230 lb. black male who resided across the street from the Martin County Governmental Center in Williamston, Martin County, North Carolina, United States of America. On the date of the incident, Decedent Tarik K. Rodgers was gainfully employed and the father of two (2) minor daughters, Ashanti and Quinn. (Pet.App. 4) The Decedent did not have a criminal history or a reputation in the community for criminal activity or violence and was not under the supervision of the Martin County Department of Adult Probation and Parole.

On April 14, 2002 at approximately 9:00 p.m., a domestic violence protective order was served on Decedent Tarik K. Rodgers. At approximately 10:00 p.m. Decedent Tarik K. Rodgers went to the home of Angela Freeman, the mother of his two (2) daughters to discuss his parental rights. Upset about receiving the order, Decedent Tarik K.

Rodgers forcibly removed Freeman from her residence, placed her in his champagne colored Mitsubishi Diamante, bearing a North Carolina registration plate and drove her out to the area of Prison Camp Road. (Pet.App. 4).

On the way to Prison Camp Road, Decedent Tarik K. Rodgers and Freeman discussed the domestic order and the two of them were able to determine that it was a misunderstanding. Consequently within 15 to 20 minutes of Decedent Tarik K. Rodgers and Freeman being together, they were able to settle their differences. Freeman and Decedent Tarik K. Rodgers make up and even engaged in consensual sex while out on Prison Camp Road. (Pet.App. 4).

Decedent Tarik K. Rodgers had stated to Freeman that he wanted to go home and was headed there when Defendant Cross spotted him and the high speed chase began outside of the city limits of Williamston, North Carolina. The chase was soon joined by Martin County Deputy Sheriff Walter Farrow, who was on his way home after leaving the residence of a female companion. (Pet.App. 4).

Farrow was off duty at the time he decided to engage in the high speed vehicular pursuit of Decedent Tarik K. Rodgers. Soon after Farrow join the chase, it was also joined by Williamston Police Officers Sergeant William Waters, Elvie Forney, Melanie Cox, Detective Charles Brown, Roanoke-Chowan Narcotics Task Force Agent Scott McFarlane.[1] Unable to reach home safely, because of the

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[1]Plaintiffs police practice expert, Robert W. Klotz, stated in his August 18, 2004 Preliminary Expert Report at p.4-5, that the pursuit of Decedent Tarik K. Rodgers was carried out to apparent violation of the

hot pursuit of officers driving at speeds in excess of 90 to 100 mph through areas in and outside of the City of Williamston, Decedent Tarik K. Rodgers decided that it was time to end the pursuit, so he then tapped on his brakes causing the vehicle presumably driven by Waters to collide with the rear of his vehicle. After the collision Decedent Tarik K. Rodgers' vehicle came to rest on Roberson and W. Main Streets next to CBs Laundromat and Car Wash. The intersection of Roberson and W. Main Street was well illuminated as there was and is a street light and external lights on the exterior of the car wash bays, all of which were operational and on April 15, 2002, Moreover, Williamston Police vehicles are equipped with videotaping equipment, which is activated by turning on the emergency lights of said police vehicles. (Pet.App. 4-5).

After Decedent Tarik K. Rodgers' vehicle came to a rest, Brown approached Decedent Tarik K. Rodgers' vehicle and using his service revolver knocked on the driver's side window, attempting to break it. Decedent Tarik K. Rodgers, responding to the officer's commands that he exit the vehicle, voluntarily opened the door to his vehicle with the assistance of officers because the door had been initially jammed after the crash. Brown then attempted to remove Decedent Tark Rodgers from the vehicle by grabbing Decedent Tarik K. Rodgers' clothing and tearing his shirt.

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mutual aid agreement since several members of the Williamston Police Department left their area of jurisdiction and entered into the County to assist in the pursuit without the appropriate authorization and that the pursuit was carried out in a manner contrary to the national police standards.

Initially K-9 Officer Brejhar ran past Decedent Tarik K. Rodgers who was still seated in his vehicle and attacked Roanoke-Chowan Drug Task Force Agent Scott McFarlane. The K-9 officer was able to subdue McFarlane with one bite. After retrieving the K-9 Officer Brejhar off of McFarlane, Sgt. William Waters without giving any warning or verbal commands to the Decedent Tarik K. Rodgers deployed K-9 Officer Brejhar to attack Decedent Tarik K. Rodgers by walking the K-9 officer up to within 5 feet of where Decedent Tarik K. Rodgers was standing. At the time of this unprovoked attack Decedent Tarik K. Rodgers had exited his vehicle with his hands up and without a weapon of any kind therein. The K-9 Officer Brejhar then attacked Decedent Tarik K. Rodgers biting him several times on his hands, legs and waistline. (Pet.App. 5-6).

Decedent Tarik K. Rodgers' attention was immediately focused on the K-9 officer that was inflicting what had to have been excruciating and torturous pain upon him[2] and from which he was attempting to protect himself. Then suddenly and without warning while Decedent Tarik K. Rodgers was either falling or already on the ground being subdued and apprehended by the K-9 Officer Brejhar, Waters and Farrow then drew their weapons and suddenly and without warning, fired shots at close range into Decedent Tarik K. Rodgers' head and torso. At the time Waters and Farrow fired their weapons both the K-9 officer,

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[2]The force of a police dog's bite is between 1,200 and 2,000 pounds per square inch. See Douglas U. Rosenthal, Note, When K-9s Cause Chaos – An Examination of Police Dog Policies and Their Liabilities, 11 N.Y.L. Sch. J. Hum. Rts. 279, 296 (1994).

which was still on Decedent Tarik K. Rodgers' waist and Freeman were in the line of fire. Decedent Tarik K. Rodgers was struck eight (8) times, causing perforation of his heart, brain and lungs, which proximately resulted in his death.[3] He had no pulse and no respirations at the scene. (Pet.App. 8).

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant review in this case not only because the majority opinion of the Fourth Circuit is fundamentally unsound, but, by the Courts own admission, it is in conflict with other United States Circuit Court of Appeals on important matters concerning the use of force on police officers and the use of police dogs during the arrest. See Supreme Court Rule 10. Further, the Fourth Circuit in its reasoning in deciding the important federal question concerning the Fourth Amendment had departed from accepted judicial reasoning and announced a decision, that if adopted, would sanction police conduct that would often lead to results that are both disastrous and unnecessary.

The analysis of the Fourth Circuit regarding what constitutes a constitutionally reasonable seizure under the Fourth Amendment would allow police to exercise their great discretion to use deadly force without appropriate restraint. The majority opinions short-sighted analysis concluding that Mr. Rodgers was not "seized" for Fourth Amendment purposes (Pet.App. 9-10) is inconsistent with this Courts precedents on the subject. The Court of Appeals' decision allowing the District Court's dismissal of

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[3]See Coroner, Dr. Paul R. Spence's Autopsy Report dated August 27, 2002, at J.A. p.364-368. (on file in Fourth Circuit).

Petitioner's claims at summary judgment to stand denies him his fundamental right to a jury trial on the disputed facts in this case.

In short, all three questions presented in this case are more than erroneous facts findings or misapplications of a properly stated rule of law.

The United States Court of Appeals for the Fourth Circuit has decided important questions of federal law that should be settled by this Court to help avoid tragedy and confusion as police proceed with the use of force when handling the many domestic violence calls they receive annually. In a recent opinon from a Justice of this Court it was noted that "Family disturbance calls...constitute the largest single category of calls received by police departments each year." See Georgia v. Randolf, 547 U.S. ___ (2006). (Justice Breyer concurring) (Slip op. At 2) citing, Mederer & Gelles, Compassion or Control: Intervention in Cases of Wife Abuse, 4 Journal of Interpersonal Violence 25 (Mar. 1989). That opinion further noted a study that found one third of all police time is spent responding to and handling domestic disturbance calls. Supra, Randolph.

Because, the nature of the police interaction in the case began as a domestic disturbance call, this Court's guidance is needed to set a suitable standard for police conduct in handling such matters, particularly, when the use of police dogs and deadly force by shooting is contemplated.

Police accountability should be an important consideration in sound constitutional decision making, particularly when Fourth Amendment issues are involved. See generally, José Felipé Anderson, Accountability

Solutions in the Consent Search and Seizure Wasteland, 79 Neb L. Rev. 711, 747-761 (2000) (discussing the dangers of unchecked police discretion in Fourth Amendment seizures).

The trial court determined that Farrow could not be held liable for excessive force because he had not "seized" the Decedent Tarik K. Rodgers. The court reasoned that there could be no Fourth Amendment violation because "the plaintiffs have not come forward with any evidence that any bullets from Farrow's gun touched the Decedent, nor have they constructed an argument that would impeach Farrow's story." Under these circumstances, the Fourth Amendment is simply not implicated in the case."

Relying on California v. Hodari D, 499 U.S. 621 (1991), and having found that there was no underlying violations by the officers, McFarlane, Edmondson, Cross, Pippin and Roach, the court granted summary judgment in favor of these Defendants as well.

The trial court and the Fourth Circuit both erred in finding that there had been no Fourth Amendment seizure in this case. This Court has defined a seizure as a "governmental termination of freedom of movement through means intentionally implied." Brower v. County of Invo, 489 U.S. 593, 596-597, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989). An objective test is to be applied in determining whether the means of a seizure was intentionally applied, and a seizure will be held to have occurred even when an unintended person or thing is the object of the detention. Id. Because Officer Farrow had the objective intent to make a seizure by firing his weapon at the unarmed Decedent who was already under the attack of a K-9 Officer and surrounded by several officers with their

guns drawn, the Fourth Amendment is applicable. It should be noted that full discovery or limited discovery has not been effected on key probative areas in this case (review of forensic evidence, Williamston and Martin County Sheriffs' departmental history of similar incidents, other dog bite incidents, adequacy of officer training, negligent hiring and supervising etc.). Farrow acting in concert with the other Defendants would clearly not be entitled to judgment as a matter of law as there are material facts in dispute which indicate that the use of force n this case was not objectively reasonable. Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989); Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991). Such facts include that the Defendants shot the Decedent eight times in the head and torso while he was under the seizure of the K-9 officer; that the unarmed Decedent Tarik K. Rodgers had his hands in the air when he was viciously attacked by the K-9 officer that the attack by the K-9 officer occurred *without any verbal warning* from Waters; and that without any mention of seeing a gun, at least one of the Defendants stated that the Decedent was shot while the Decedent was on the ground[4] with his right hand across his waistline

The facts of this case, viewed in the light most favorable to the Plaintiff, support a § 1983 excessive force claim based on the Fourth Amendment and render summary

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[4]Angela Freeman and Defendant McFarlane's version of the shooting are consistent not only with several civilian eyewitness testimony but also it is consistent with the medical findings of the Coroner Paul Spence, M.D. Autopsy Report dated August 27, 2002 at J.A. p.364-368 indicating that 5 of the 8 gunshot wounds were downward in trajectory.

judgment inappropriate for the Defendant Waters.

The municipal Defendants each have customs and policies that are unconstitutional because they foster the use of excessive force. Accordingly, the Defendants also violated the Decedent's constitutional rights. Monell v. Department of Social Services, 436 U.S. 658, 690-691, 98 S. Ct. 2018, 2035-2036 (1978) and Handle v. City of Little Rock, 722 F. Supp. 434, 438 (8th Cir. 1991).

Each of the issues presented to this Court involve a review of the trial court's decision to grant summary judgment in favor of the Defendants. The District Court's grant of summary judgment is reviewed *de novo.* Higgins v. E.I. DuPont de Nemours & Co., 836 F.2d 1162, 1167 (4th Cir. 1988). Rule 56(c) mandates that the moving party is entitled to summary judgment only if there is no genuine issue of material fact. The facts must be reviewed in the light most favorable to the plaintiff. Mensh v. Dyer, 956 F.2d 36, 39 (4th Cir. 1991). This Court has made clear that all justifiable inferences must be drawn in favor of the non-moving party because "[c]redibility determination, the weighing of inferences and the drawing of inferences from the facts are jury functions. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court of Appeals failed to give the Petitioner the benefit of applying these legal standards.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT FARROW BASED UPON A FINDING THAT, AS A MATTER OF LAW, PLAINTIFF WAS NOT SUBJECTED TO A SEIZURE UNDER THE FOURTH AMENDMENT.

By ordered dated March 3, 2005, the District Court granted summary judgment in favor of Defendant Farrow. Applying a Fourth Amendment analysis to the facts, the court citing the dissenting opinion of Justice Stevens in California v. Hodari D, 499 U.S. 621 (1991), held that Defendant Farrow's use of deadly force by discharging his weapon but not actually shooting the Decedent did not constitute a seizure within the meaning of the Fourth Amendment. The reliance on the Justice Stevens' dissent is misplaced since Justice Stevens only stated parenthetically as dicta "**in rejecting** the majority's expanded definition of seizure that "the Court assumes without acknowledging, that a police officer may now fire his weapon at an innocent person and not implicate the Fourth Amendment as long as he misses his target" Id. at 630. Although, the Hodari majority did not reach this conclusion since Justice Scalia was careful to limit the holding to the facts of that case, Justice Stevens' rebuke and thorough review of Fourth Amendment jurisprudence makes it clear that such a definition is untenable. The Court of Appeals has misconstrued the current status of the law with respect to what constitutes a seizure for Fourth Amendment purposes.

The issue of whether the Decedent Tarik K. Rodgers was subjected to a seizure, which entitled him to the protection of the Fourth Amendment is controlled by Brower v. County of Invo, 489 U.S. 593 (1989). In Brower, as in the case at bar, the police were involved in the high-speed chase of the driver of a stolen automobile, whereas in the instant matter, the Decedent was an alleged kidnap suspect. In an effort to apprehend the suspect, the Brower police positioned a truck across the road to serve as a roadblock. The suspect collided with the truck and was

killed.

Holding that Brower had been subjected to a deliberate seizure, this Court stated that a "violation of the Fourth Amendment requires an intentional acquisition of physical control." Brower v. County of Invo, supra, at 596. The Court further stated as follows:

> It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement **through means intentionally applied [as in the case of a police officer use of deadly force by discarhing his weapon].**

Brower v. County of Invo, supra, at U.S. 596-597. **(Emphasis added)**.

An objective test is to be used in determining whether the police intentionally applied the means of a seizure. It is undisputed that Defendant Farrow intentionally discharged his weapon at least two times in an attempt to terminate the freedom of movement of the Decedent Tarik K. Rodgers. The police in Brower argued that they did not specifically intend for the plaintiff to strike the roadblock, yet they were found to have the general intent to effect a seizure as was evidenced by the fact that they placed the roadblock in the road. The Court stated that "[i]t may well be that respondents here preferred, and

indeed earnestly hoped that Brower would stop on his own without striking the barrier, but we do not think it practicable to conduct such an inquiry into subjective intent." Brower v. County of Invo, supra, at U.S. 598 (citations omitted). See also, Sturges v. Mathews, 53 F.3d 659, 661-662 (4th Cir. 1995) (no specific intent required for seizure). Because the only inquiry in assessing whether a use of force constitutes a seizure is whether or not the use of force itself was willful, "a seizure occurs **even when an unintended person or thing is the object of the detention or taking**. " Brower v. County of Invo, supra, at U.S. 596, citing, Hill v. California, 401 U.S. 797, 802-805, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971); cf. Maryland v. Garrison, 480 U.S. 79, 85-89, 94 L. Ed. 2d 72, 107 . Ct. 1013 (1987). **(Emphasis added)**.

It is clear that, under the Brower definition of a seizure, the Decedent who was a suspected felon that was under the attack of K-9 Officer Brejhar and fired upon by at least one other defendant, Officer Waters, was again *"seized"* by Defendant Farrow who admittedly fired upon the Decedent. All that is required is that Farrow intended to terminate the freedom of movement of the Decedent through some direct physical action which substantially alters his movement. Furthermore, Petitioner contends a suspect, whose vehicle had been disabled in a collision with a law enforcement vehicle after a high speed chase, as was the Decedent in this case, and who is also **surrounded by several law enforcement officers with their guns drawn**, one of which was the Defendant Farrow, had been effectively seized notwithstanding the subsequent weapons discharge by Farrow and others. Additionally, Petitioner further contends that its position is sustained by the so-

called Mendenhall test, formulated by Justice Stewart's opinion in United States v. Mendenhall, 446 U.S. 544, 554 (1980), and adopted by the Court in later cases, see Michigan v. Chesternut, 486 U.S. 567, 573 (1988); INS v. Delgado, 466 U.S. 210, 215 (1984); "[A} person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 466 U.S. at 554. See also Florida v. Royer, 460 U.S. 491, 502 (1983) (opinion of WHITE, J.). Under the undisputed facts of this case, there is little doubt that the Decedent upon being fired at by Farrow understood the message that the he was not free to leave the scene. Hence, a Fourth Amendment seizure effected by Farrow had occurred.

In the instant matter, the Decedent Tarik K. Rodgers obviously was "seized" when he was grabbed by Officer Brown, when he was attacked and subdued without warning by K-9 Officer Brejhar and undoubtedly when he was shot **at and by** Farrow, Waters and others multiple times. In Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991), the Fourth Circuit held that the improper deployment of a police dog that mauls the target constitutes excessive force in violation of the Fourth Amendment. Kopf was decided in 1991, eleven years before the attack on Decedent Tarik K. Rodgers. Accordingly, it was clearly established in 2002 that failing to give a verbal warning before deploying a police dog to seize someone under the circumstances as presented by Petitioner is objectively unreasonable and a violation of the Fourth Amendment. Furthermore, as this Court recognized in Tennessee v. Garner, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985), "there can be no question that

apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." The pivotal question is when the use of deadly force is reasonable.

Construing the facts in this case, in a light most favorable to the plaintiff, Officer Farrow while recklessly standing upon the hood of his patrol vehicle [by his own admission, out of fear of the K-9 Officer Brejhar] participated with others in firing twenty-three (23) shots at an unarmed, compliant suspect, who was on the ground under the vicious attack of K-9 Officer who had already bitten Officer McFarlane and incapacitating him with one bite.

Petitioner respectfully offer that it is inconceivable under the conflicting circumstances of this case that the Defendant Farrow is entitled to summary judgment on the basis of qualified immunity. Decedent Tarik K. Rodgers was subjected to a seizure as a matter of law by Defendant Farrow, and should be entitled to have his § 1983 claims assessed under a Fourth Amendment analysis.

II. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT WATERS AND BROWN WERE ENTITLED TO QUALIFIED IMMUNITY FROM CLAIMS UNDER 42 U.S.C. § 1983 WHERE THERE WAS EVIDENCE THAT THEIR CONDUCT WAS OBJECTIVELY UNREASONABLE AND WHERE NO REASONABLE PERSON WOULD HAVE THOUGHT THAT THEIR ACTIONS WERE LAWFUL.

The defense of qualified immunity may be applied in cases involving excessive force in violation of the Fourth

Amendment. Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 191). Police officers are entitled to judgment on the defense of qualified immunity only if they can establish that their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have know." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Police officers "are not entitled to summary judgment on qualified immunity if in light of pre-existing law the unlawfulness [of their conduct] was apparent." Kane v. Hargis, 987 F.2d 1005, 1007 (4th Fir. 1993), citing, Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

At the time of Decedent's arrest, it was clearly established that the amount of forced used in making an arrest must be reasonable. Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). An objective standard is applied in determining whether a particular use of force was reasonable. This Court has articulated that standard as follows:

> [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an unreasonable use of force constitutional.

Graham. Supra. at U.S. 397. (citations omitted)

The Fourth Amendment to the U.S. Constitution prohibits the unreasonable seizure of persons by law enforcement authorities. Graham v. Connor, 490 U.S. 386,

396, 109 S. Ct. 1865, 1872 104 L. Ed. 2d 443, 451 (1989) In an excessive force case, the specific inquiry "is whether a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances." Rowland v. Perry, 41 F.3d 167, 173 (summary judgment inappropriate where officers beat a retarded suspect during arrest for stealing a five dollar bill). The court must evaluate whether the "totality of the circumstances" justified the particular sort of force employed. Tennessee v. Garner, 471 U.S. 1, 8-9, 105 S. Ct. 1694, 1700, 5 L. Ed. 2d 1 (1985).

III. THE TRIAL COURT ERRED IN FINDING THAT MARTIN COUNTY SHERIFF KEITH ROACH, WILLIAMSTON CITY AND WILLAMSTON POLICE CHIEF STEVE SMITH WERE ENTITLED TO BE DISMISSED FROM CLAIMS UNDER 42 U.S.C. § 1983, AS WELL AS THAT THESE DEFENDANTS WERE ENTITLED TO BE DISMISSED FROM CLAIMS N.C.G.S. § 28A-18-2 WRONGFUL DEATH CLAIM; GROSS NEGLIGENCE CLAIM; ASSAULT, BATTERY, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WITH A REQUEST FOR PUNITIVE DAMAGES CLAIMS.

By order of Court dated January 15, 2004, the Court stayed discovery against the City of Williamston and Martin county Sheriffs Department pending the resolution of Defendants qualified immunity defenses.

Plaintiffs further contend that the use of force in the

instant case was excessive and that the actions of Defendants Farrow, Brown, and Waters were not objectively reasonable under the circumstances and thus Plaintiffs should be permitted to conduct full discovery upon the Court's denial of the reversal of the District Court's granting of the Defendants' summary judgment motions.

The District Court was well aware that the Plaintiffs also sued certain of the Defendants under Monell v. Depart. of Social Services, 436 U.S. 658 (1978), which established that municipalities and counties could be liable for constitutional deprivations under § 1983. This Circuit has found that municipal liability "is derivative of, but narrower than" the liability of individual officers. Kopf v. Wing, 942 F.2d 265, 269 (4th Cir. 1991) (citing Spell v. McDaniel, 824 F.2d 1280 (4th Cir. 1987)). Thus, the Plaintiffs contend that we can prevail on our Monell claim once we prove that Defendants used excessive force against the Decedent and this use of force was caused by an unconstitutional custom or practice of the City of Williamston and Martin County Sheriffs Department.

The Fourth Circuit, while admitting the case was tragic, ignores the practical consequence of its decision. (Pet.App. 17) It allowed the police departments involved through its officers to kill Rodgers without adequate accountability, even though the majority opinion by Chief Judge Wilkins concluded that "It is possible, as the Estate contends, that Rodgers was attempting to surrender when he was engaged by the police dog and shot by the officers." (Pet.App. 17) This shocking conclusion requires this courts review.

The Fourth Circuit erred when it narrowly defined

whether a seizure had occurred in this case. Does this nation really embrace a rule of law that allows police this much latitude to use deadly force? Examination of Petitioner's body revealed that he "had been shot multiple times in the head and body. He also exhibited bite marks on his right arm, hand, abdomen, and thigh." (Pet.App. 8).

Rodgers' conduct was consistent with surrender, as admitted by the majority opinion, a witness heard Rodgers' say "hold up as he tried to get out." (Pet.App. 8) The fact that several different police agencies were involved in the pursuit and investigation of Rodgers provides another compelling reason for this Courts review since this type of multiple department pursuit is likely to recur all over the country, guidance should be offered by this Court.

The Fourth Circuit readily admits that to affirm the District Court's decision on summary judgment it must construe the facts in the light most favorable to the Petitioner. See Wilson v. Flynn, 429 F.3d 465, 466 (4th Cir. 2005). p.3 But its decision utterly failed to give the Petitioner the benefit of the standard for summary judgment.

Indeed the Fourth Circuit's opinion concedes, as it must, that "[t]he record evidence viewed in the light most favorable to the Estate, supports the conclusion that when Rodgers initially emerged from his vehicle, his hands were up, and they were empty." It has long been recognized that police officers often exercise a great deal of discretion at the street level that is out of the presence of their supervisors. See Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process & Law - Visibility Decisions in the Administration of Justice, 69 Yale L. J. 543, 552-53 (1960).

There is already great difficulty in successfully suing individual police officers because of immunity. See Derek

W. Meineche, Note Assessment of Conduct During High-Speed Chases in State Tort Liability Cases: The Effects of Fiser v. City of Detroit, 46 Wayne L. Rev. 325 (2000) (discussing generally the problem of obtaining civil judgments against police). The Fourth Circuit's opinion improperly raises the barrier, crippling Petitioners' valid claims for relief.

CONCLUSION

After participating in a high speed chase of the Decedent, an off duty Farrow stood upon the hood of his patrol vehicle, in fear of K-9 Officer Brejhar, who was out of control and had just bitten Officer McFarlane and fired with others a total of twenty-three rounds at an unarmed, compliant Tarik K. Rodgers killing him. Farrow violated Rodgers' rights. Sheriff Roach in his individual and official capacity as head of the Martin County Sheriff's Department allowed it to happen by failing to train and supervise Farrow. Waters who also participated in the high speed chase of the Decedent, had alerted participating officers via radio communications that he was going to release the K-9 Officer upon the Decedent at the end of the case. Waters without any verbal warning commanded his dog to apprehend Tarik K. Rodgers, who had exited his vehicle with his hands in the air and without a weapon therein. Waters violated Rodgers' rights. The City of Williamston and Chief of Police, Steve Smith, allowed it to happen by the negligent training and supervision of its officers.

Brown who also participated in the high speed chase of the Decedent, and after the Decedent's vehicle came to rest, began banging on the driver's side window with his service revolver in an attempt to break the window of a reportedly armed and dangerous suspect, who had a kidnap

victim in his vehicle, telling the Decedent and Freeman to get out. Once the complying Decedent assisted Brown with opening his previously jammed driver's side door, Brown without provocation forcibly grabbed the seat-belted Decedent by the shirt tearing it and when the Decedent reached to disengage the seat-belt unit, Brown yelled "gun." Rodgers then exited his vehicle with his hands in the air and without a weapon therein and soon after was viciously and without warning attacked by the K-9 Officer, then fired at 23 times, struck 8 times to the head and torso, dying at the scene. Brown violated Rodgers' rights. The City of Williamston and Chief of Police, Steve Smith, allowed it to happen by the negligent training and supervision of its officers.

This Court should grant review of the decision of the Fourth Circuit and remand this matter for trial on the merits.

In his concurring and dissenting opinion Judge Gregory properly disagreed with the majorities analysis of the deployment of the police dog by Officer Waters. Judge Gregory reasoned that Officer Waters' deployment of the police dog was objectively unreasonable under the circumstances. Judge Gregory properly observed that the majority opinion misapplied two of the Fourth Circuit's own precedents when it concluded that the "without prior warning" police dog was reasonable. Judge Gregory explained that the majority clearly ignored Vathekan v. Prince Georges County, 154 F.3d 173, 178 (4th Cir. 1998) ("an attack by an unreasonably deployed police dog in the course of a seizure is a Fourth Amendment violation). Judge Gregory further reasoned that the majority also ignored its own similar precedent in Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991), which would have afforded the

Decedent the opportunity to surrender. Judge Gregory noted that the circumstances of the case "as portrayed in the video, provided strong evidence that Rodgers did not have a gun in his hand prior to being engaged by the dog." (Pet.App. 20). Judge Gregory , unlike the majority, properly concludes that Officer Waters' deployment of the dog in this case "without warning against a suspect who was completely surrounded and who as evidenced by the officers own actions, had not drawn his gun or otherwise endangered [him]." (Pet.App. 20). A jury should have had an opportunity to find the officer's actions unreasonable. Because of all the circumstances of the case presented in the foregoing Petition, review by the Court of the opinion of the Fourth Circuit is desirable and in the public interest. See Priester v. City of Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000) (denying qualified immunity to officer who allowed a police dog to attack an arrestee who was already on the ground).

Respectfully submitted,

José Felipé Anderson, Esquire
1420 N. Charles Street
Baltimore MD 21201
410-837-4398
Counsel of Record

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1382

ESTATE OF TARIK K. RODGERS, by and through his Administrators, Michael Rodgers and Brenda Rodgers; MICHAEL RODGERS, as parent of the decedent; BRENDA RODGERS, as parent of the decedent,

Plaintiffs - Appellants,

versus

STEVE SMITH, individually and in his official capacity as Chief of Police of the City of Williamston Police Department, North Carolina; KEITH ROACH, individually and in his official capacity as the Sheriff for Martin County; WALTER J. FARROW, III, individually and in his official capacity as a Martin County Deputy Sheriff; WILLIAM R. WATERS, JR., individually and in his official capacity as a Williamston North Carolina police officer; MELANIE COX, individually and in her official capacity as a Williamston North Carolina police officer; CHARLIE BROWN, individually and in his official capacity as a Williamston North Carolina police officer; ELVIE FORNEY III, individually and in his official capacity as a Williamston North Carolina police officer; SCOTT MCFARLAND, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN EDMONDSON, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN HARDISON, individually and in his official capacity as a Williamston North Carolina police

officer; TRAVIS COWAN, individually and in his official capacity as a Williamston North Carolina police officer; STACEY PIPPIN, individually and in his official capacity as a Williamston North Carolina police officer; DAVID CROSS, individually and in his official capacity as a Martin County Deputy Sheriff; THE CITY OF WILLIAMSTON, NORTH CAROLINA,

Defendants - Appellees,

and

DONNIE PITTMAN, individually and in his official capacity as the County Manager for Martin County, North Carolina; MARTIN COUNTY, NORTH CAROLINA,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Malcolm J. Howard, District Judge. (CA-03-44-4-H)

Argued: December 1, 2005 Decided: June 26, 2006

Before WILKINS, Chief Judge, GREGORY, Circuit Judge, and Walter D. KELLEY, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Chief Judge Wilkins wrote the majority opinion, in which Judge Kelley joined. Judge Gregory wrote an opinion concurring in part and dissenting in part.

ARGUED: Teresa Louise Smallwood, Windsor, North Carolina; Robert Arlington Berry, Harrisburg, Pennsylvania,

for Appellants. **ON BRIEF**: Gary S. Parsons, BAILEY & DIXON, Raleigh, North Carolina;
Mark Allen Davis, WOMBLE, CARLYLE, SANDRIDGE & RICE, Raleigh, North Carolina, for Appellees. **ON BRIEF**: K. Jameson Lawrence, Baltimore, Maryland, for Appellants. Gavin B. Parsons, BAILEY & DIXON, L.L.P., Raleigh, North Carolina, for Appellees S. Smith, W. R. Waters, M. Cox, C. Brown, E. Forney, B. Hardison, T. Cowan & City of Williamston.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)
.WILKINS, Chief Judge:

The Estate of Tarik K. Rodgers (the Estate) brought this federal civil rights action, see 42 U.S.C.A. § 1983 (West 2003). claiming violations of the Fourth Amendment in connection with the death of Tarik Rodgers (Rodgers). The Estate now appeals a decision of the district court granting summary judgment, on the basis of qualified immunity, to certain of the defendants.[1] For the reasons set forth below, we affirm.

I.

The pertinent facts, viewed in the light most favorable to the Estate, see Wilson v. Flynn, 429 F.3d 465, 466 (4th Cir. 2005), are as follows. On April 14, 2002, a Martin County, North Carolina Sheriff's deputy served a

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[1]The district court had previously dismissed other claims against these defendants and the claims against other defendants. The Estate does not appeal those dismissals.

restraining order on Rodgers. The order prohibited Rodgers from coming into contact with his girlfriend, Angela Freeman, and their two children.

At approximately 10:00 that evening, Rodgers drove to Freeman's house and abducted her at gunpoint. He drove her to a remote area, where they discussed the protective order. After resolving their differences, they engaged in consensual sex. Rodgers was upset about his conduct that evening and wondered aloud to Freeman how he was going to explain himself to their children. At one point he asked Freeman to shoot him, but she refused.

Around midnight, Rodgers drove by Freeman's home to see if any police officers were there. (Although Rodgers had warned those present in Freeman's home not to call the police, the police had nevertheless been contacted and informed that Rodgers had abducted Freeman at gunpoint.) Rodgers eventually passed a patrol car and "took off." J.A. 93 (internal quotation marks omitted). A high-speed chase ensued that involved Martin County Deputy Sheriff Walter Farrow and City of Williamston, North Carolina police officers William Waters, Elvie Forney, Melanie Cox, and Charles Brown. The chase, which continued until nearly 2:00 a.m. on the morning of April 15, was later joined by Scott McFarlane, a plain clothes narcotics officer from another jurisdiction. The officers engaged in the chase were aware that Rodgers had abducted Freeman and that he was considered armed and dangerous.

Rodgers ended the chase by stopping abruptly in a parking lot, causing Officer Waters to crash into the rear of Rodgers' vehicle. Officer Waters exited his vehicle with his

trained police dog. Officer Waters released the dog, which mistakenly attacked Officer McFarlane, biting him on the left leg.

As Officer Waters was commanding the police dog to release Officer McFarlane, Rodgers was attempting to exit his vehicle through the damaged driver's side door, and the other officers who had been involved in the chase were approaching Rodgers' vehicle. Freeman, who was still in the passenger seat of the automobile, heard Rodgers saying "holdup" as he tried to get out. Id. at 109. Rodgers had his hands up and, at that point, had nothing in them. However, Freeman did not notice whether Rodgers' weapon, which had been between his seat and the center console, was still there. As Rodgers emerged from the car, Freeman could only see his left side, not his right.

Officer Brown grabbed Rodgers by the shirt to get him out of the car. Rodgers did not have a weapon at that time, but as Brown was pulling him out of the vehicle, Rodgers leaned back in and grasped his firearm. Officer Brown yelled "Gun!" and backed away from the vehicle. Officer Waters heard this warning and saw Rodgers emerging from his vehicle. Officer Waters did not see a Weapon,[2] but he observed that Rodgers had his right

[2]The record contains three evidentiary items concerning Officer Waters' observations: the State Bureau of Investigation (SBI) statement he made shortly after the incident, an affidavit sworn in late November 2004, and a transcript of his deposition testimony, given in October 2004. The affidavit indicates that Officer Waters saw Rodgers with a firearm before he deployed the police dog, while the SBI statement indicates that he did not see the weapon until after the deployment. Officer Waters' deposition testimony (at least the portion included in the record) does not directly address this topic. We assume the truth of the SBI statement, as that is most favorable to the

hand under his shirt. Deputy Farrow, however, did observe Rodgers emerge from his vehicle with a firearm in his right hand. Officer Waters deployed the police dog, which initially engaged Rodgers by the arm. Officer Waters then then saw Rodgers point the firearm at him (Officer Waters). In the ensuing seconds, Officer Waters and Deputy Farrow fired their weapons. Bullets from Officer Waters' firearm struck Rodgers multiple times, killing him.

Some of the events surrounding the shooting were captured on videotape by a camera located in Officer Forney's patrol vehicle. The recording begins as Officer Forney turns his vehicle to approach the crash scene. Officer Forney stopped behind Deputy Farrow's vehicle, thus placing Deputy Farrow's vehicle between the video camera and Rodgers' and Officer Waters' vehicles.

At 1:50:56 on the recording, Deputy Farrow can be seen in the center of the screen, climbing up the side of his vehicle from behind the open driver's side door. (He later testified that he was trying to stay out of the way of the police dog.) Officer McFarlane is to the left of Deputy Farrow's vehicle, crouched on the ground with his firearm in his right hand. At 1:51:01, Officer Waters comes into view from the left of the screen with the police dog. Officer Waters brings the dog forward a few feet and releases it, at which point the dog is out of view in front of Deputy Farrow's vehicle. Having released the dog, Office Waters moves forward a few more steps and appears to be quite close to Rodgers.

Estate.

As Officer Waters deploys the dog, Rodgers can be seen. Because of the location of Deputy Farrow's vehicle with respect to the video camera, Rodgers at first is viewable only through the back and front windshields of Deputy Farrow's vehicle. He appears to be leaning slightly forward, and his arms are contrasted against the white shirt he is wearing. At 1:51:03, Rodgers appears to rise up, raising his left arm. Deputy Farrow is standing on the ground behind the driver's side door of his vehicle, and Officer McFarlane is kneeling a few feet to the left. Both officers have their weapons drawn. At 1:51:04, Rodgers' left arm has come down and he is falling backward, evidently having been engaged by the police dog, Officer McFarlane

McFarlane is now standing on his uninjured right leg. At 1:51:06, Rodgers is out of view, Officer Brown is backing away, and Officer McFarlane has advanced a small distance. Officer Forney comes into view on the left, behind the other three officers.

Rodgers appears again at 1:51:07, coming toward the officers as he falls. Rodgers has moved to the left of Deputy Farrow's vehicle and is no longer obscured by it. He is moving sideways and is facing the video camera; thus, he is falling to his right, toward the officers. Two muzzle flashes can be seen as Officer Waters draws and fires his weapon. As Rodgers falls to the ground, his firearm can be seen leaving his hand and landing a few feet away. At 1:51:08, Rodgers is on the ground and now unarmed, and Officer Waters fires again. At 1:51:10-11, three more muzzle flashes are seen from Officer Waters' weapon. The other officers--except Deputy Farrow, who continues to use the door of his vehicle as a shield--back away as the

incident ends. Rodgers is lying on the ground but is still being pulled by the police dog, which is out of view but evidently has engaged Rodgers' leg. The time elapsed from when Rodgers first appears on the video recording until the firearm is seen leaving his hand is no more than seven seconds.

Rodgers was transported to the hospital and pronounced dead. Examination of the body revealed that Rodgers had been shot multiple times in the head and body. He also exhibited bite marks on his right arm, hand, abdomen, and thigh. It is undisputed that shots fired by Officer Waters killed Rodgers; Deputy Farrow discharged his weapon but did not hit Rodgers, and Officer McFarlane never discharged his weapon.

The Estate subsequently brought this action alleging multiple claims against the officers involved in the shooting, other individuals, and Martin County and the City of Williamston. As is relevant here, the Estate alleged that Rodgers' Fourth Amendment rights were violated by the deployment of the police dog without prior warning and by the use of deadly force by Deputy Farrow and Officer Waters. We address each of these claims below.

II.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," Malley v. Briggs, 475 U.S. 335,

341 (1986); it protects law enforcement officers from "bad guesses in gray areas" and ensures that they are held liable only "for transgressing bright lines," *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir. 1992). Because qualified immunity "is an entitlement not to stand trial or face the other burdens of litigation," *Saucier v. Katz,* 533 U.S. 194, 200 (2001) (internal quotation marks omitted), the question of its applicability should ordinarily be resolved at the summary judgment stage, see *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005).

When a defendant asserts entitlement to qualified immunity, the court must consider two questions. The first is "whether a constitutional right would have been violated on the facts alleged" by the plaintiff. *Saucier,* 533 U.S. at 200. If so, the next question is whether the right asserted was clearly established at the time of the alleged violation. See id. The law is clearly established "not only when the very action in question has previously been held unlawful, but also when pre-existing law makes the unlawfulness of the act apparent." *Meeker v. Edmundson,* 415 F.3d 317, 323 (4th Cir. 2005) (internal quotation marks omitted). On appeal, we review de novo the resolution of these questions by the district court. See *Rogers v. Pendleton,* 249 F.3d 279, 285 (4th Cir. 2001).

The right the Estate alleges was violated here is Rodgers' Fourth Amendment right to be free of unreasonable seizures, a right that includes seizures accomplished by excessive force. See *Jones v. Buchanan,* 325 F.3d 520, 527 (4th Cir. 2003). The test for whether force employed to effect a seizure is excessive is one of

"objective reasonableness under the circumstances." *Graham v. Connor,* 490 U.S. 386, 399 (1989) (internal quotation marks omitted).

A.Excessive Force--Deputy Farrow

The Estate first contends that the district court erred in granting summary judgment to Deputy Farrow. There is no dispute that while Deputy Farrow did fire his weapon, no bullets from that weapon struck Rodgers. Based on this, the district court concluded that Deputy Farrow had not seized Rodgers within the meaning of the Fourth Amendment. The Estate disputes this conclusion, maintaining that it is sufficient that Deputy Farrow intended to achieve Rodgers' submission through the use of force. We disagree.

"From the time of the founding to the present, the word 'seizure' has meant a taking possession. For most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control." *California v. Hodari D.,* 499 U.S. 621, 624 (1991) (internal quotation marks & citations omitted; emphasis added). Thus, a seizure occurs only when there is a physical touching or a submission to a show of authority.[3] See id. at 625-26; *United States v. Letsinger,* 93 F.3d 140, 143 (4th Cir. 1996). Here, there was no seizure because the bullets from Deputy Farrow's weapon never touched Rodgers. See *Carr v. Tatangelo,* 338 F.3d 1259, 1267, 1270-71 (11th Cir. 2003) (noting that excessive force claim asserted by individual who was shot at by law enforcement officers, but

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[3]The Estate does not claim that Rodgers submitted to a show of authority by Deputy Farrow, or by any other officer.

not touched by bullets, did not involve Fourth Amendment seizure).

B. Excessive Force--Deployment of Police Dog

The Estate next contends that the district court erred in granting summary judgment on the Estate's claim that Officer Waters unreasonably deployed the police dog without first warning Rodgers. See *Vathekan v. Prince George's County,* 154 F.3d 173, 178 (4th Cir. 1998) ("An attack by an unreasonably deployed police dog in the course of a seizure is a Fourth Amendment excessive force violation.").

This court has twice addressed the constitutionality of the deployment of a police dog without prior warning. In *Kopf v. Wing*, 942 F.2d 265, 266 (4th Cir. 1991), law enforcement officers deployed a police dog without prior warning on two suspects who were hiding in an "extremely narrow passage" between a shed and a fence and who were thought to be armed. This court concluded that the officer responsible for the deployment was not entitled to summary judgment on the basis of qualified immunity, reasoning that failure to provide a warning and time for the suspects to surrender was unreasonable, given that they were surrounded and unable to escape. See id. at 268. In *Vathekan,* the facts viewed in the light most favorable to the plaintiff indicated that a law enforcement officer deployed a police dog, without prior warning, into a residence that he believed had been broken into. See *Vathekan*, 154 F.3d at 176-77. This court concluded that doing so was unreasonable, see id. at 180, and noted that "Fourth Circuit precedent existing in 1995 clearly established that failure to

give a warning before releasing a police dog is objectively unreasonable in an excessive force context," id. at 179.

Citing *Kopf* and *Vathekan,* the Estate contends that deployment of a police dog without a verbal warning is always objectively unreasonable. This cannot be so, however. As noted in *Vathekan* itself, a Fourth Amendment excessive force claim is evaluated under the reasonableness standard set forth in Graham. See *Vathekan,* 154 F.3d at 178; see also Kopf, 942 F.2d at 267-68 (quoting Graham) The application of this test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* at 396-97. Thus, Vathekan cannot be viewed as holding anything more than that the unwarned deployment at issue in that case was unreasonable.

Applying this test to the particular facts that faced Officer Waters when he deployed the police dog without first warning Rodgers, we conclude that there was no Fourth Amendment violation. When Officer Waters deployed the police dog, he had heard Officer Brown shout "Gun!", and he observed that Rodgers' right hand was out of view under

his shirt.[4] These observations were combined with Officer Waters' knowledge that Rodgers had kidnaped his girlfriend at gunpoint, had led police on a high-speed chase, and had stopped abruptly in a manner that caused Officer Waters' vehicle to collide with Rodgers' vehicle. At the time of the deployment, Officer Waters was no more than 10 feet away from Rodgers. Officer Waters testified during his deposition that he deployed the dog without warning because "I was close and there was no cover between [Rodgers] and I. And I didn't want to draw any more attention to myself than I had to." J.A. 285. Under these circumstances, we cannot say that Officer Waters' judgment was an unreasonable one. We therefore conclude that there was no Fourth Amendment violation in the manner Officer Waters deployed the police dog.

Even if Officer Waters' deployment of the police dog without prior warning did violate the Fourth Amendment, the unlawfulness of his conduct was not clearly established on April 15, 2002. *Kopf* and *Vathekan* stand at most for the principle that the Fourth Amendment is violated when an officer who faces no immediate threat deploys a police dog without prior warning. For the reasons set forth above, that was not the case here.

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[4]Citing Freeman's statement to the police and her deposition testimony, the Estate asserts that there is "compelling evidence that the unarmed ... Rodgers had his hands in the air when he was viciously attacked by the K-9 Officer." Br. of Appellants at 27. As set forth in Part I.A., however, Freeman's statement and deposition testimony establish that she viewed Rodgers' hands only for a brief period as he began to emerge from his vehicle. The uncontradicted testimony of officers outside the vehicle—who observed Rodgers when Freeman could not--and what can be seen on the videotape indicate that Rodgers' hands were not raised in surrender when the police dog was deployed.

C. Excessive Force--Shooting

The Estate next contends that Officer Waters used excessive force in shooting Rodgers. "The intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner,* 471 U.S. 1, 9 (1985). Nevertheless, a police officer may employ deadly force when the officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.* at 11; see *Cox v. County of Prince William,* 249 F.3d 295, 299 (4th Cir. 2001).

The record evidence, viewed in the light most favorable to the Estate, supports the conclusion that when Rodgers initially emerged from his vehicle, his hands were up, and they were empty. This much can be reasonably inferred from Freeman's testimony and from the testimony of Officer Brown. We will therefore assume that at that point, the use of deadly force would have violated the Fourth Amendment. However, no deadly force was used then. Rather, the uncontradicted record evidence establishes that at some point after initially emerging from the car, Rodgers acquired his firearm, either by reaching back into the car and grabbing it (as Officer Brown's testimony would indicate), or by some other means (such as removing it from the waistband of his pants, an inference consistent with Freeman's testimony). Further, the uncontradicted record evidence indicates that Officer Brown shouted "Gun!" and, critically, that Rodgers waved the weapon around and pointed it directly at Officer Waters and Deputy Farrow. Indeed, Officer Waters testified that he saw Rodgers point the firearm at him after Rodgers had been engaged by the police dog. When Officer Waters was presented with these

circumstances, he also knew that Rodgers had abducted his estranged girlfriend at gunpoint, had led officers on a lengthy high-speed chase, and had caused one of the pursuing vehicles to crash into his own. We therefore hold that Officer Waters' use of deadly force was not objectively unreasonable in light of the circumstances known to him at the time of the shooting.

The Estate further contends, however, that even if the use of deadly force was justified when Officer Waters fired the initial shots, that justification ended when Rodgers fell to the ground. We disagree. The reasonableness of an officer's actions rests on the information possessed by the officer at the moment that force is employed. See *Elliott v. Leavitt,* 99 F.3d 640, 643 (4th Cir. 1996). Therefore, "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Waterman v. Batton,* 393 F.3d 471, 481 (4th Cir. 2004); see *Hopkins v. Andaya,* 958 F.2d 881, 887 (9th Cir. 1992) (per curiam) (holding that second use of deadly force was unreasonable when "the exigency of the situation lessened dramatically" after the first use of deadly force).

In *Elliott*, we assessed the reasonableness of the use of deadly force by police officers who had placed a suspect, with his hands cuffed behind his back, in a police cruiser. See *Elliott*, 99 F.3d at 641-42. Moments later, the officers observed the suspect pointing a firearm at them, and they fired 22 shots in a matter of seconds, killing the suspect. See Id. at 642. We rejected the contention that the number of shots fired rendered the use of force excessive, noting that the shooting took place in a matter of seconds. See id. at 643. "That multiple shots were fired does not suggest the

officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat." Id. In contrast, in Waterman we considered a situation in which officers fired at a suspect as he accelerated his vehicle toward and then past them. See *Waterman,* 393 F.3d at 474-75. We held that officers exceeded constitutional bounds by continuing to fire after the vehicle passed them, at which point the officers knew or should have known that the immediate threat of harm had passed. See id.at 482.

We conclude that Elliott is controlling here. The videotape establishes that Rodgers fell to the ground, with his arms in the vicinity of his waist, no later than 1:51:08. At this time, Rodgers appears to be slightly curled up, thus presenting the top or back of his head to Officer Waters. Only two seconds later, at 1:51:10, Officer Waters fires three more shots. Importantly, although Rodgers' firearm left his hands as he fell, nothing in the record indicates that that Officer Waters knew that Rodgers had dropped his weapon, and thus was no longer a threat. We conclude that on this evidence, a reasonable factfinder could only conclude that Officer Waters was acting to ensure the neutralization of a deadly threat.

Even if the second volley of shots were unconstitutional, that unconstitutionality was by no means clearly established as of April 15, 2002. Waterman required us to decide whether it was clearly established in November 2000 that an officer may not use deadly force in the seconds after a serious threat had abated. See *Waterman,* 393 F.3d at 482-83. We concluded that although other circuits had reached this conclusion prior to the relevant time, the Fourth Circuit had not. See id. at 483. In light of the uncertainty of the law existing at the time of the incident, we held that the

unconstitutionality of the use of force in the seconds after a threat has abated was not clearly established. See id. Because the law on this point did not become clear until 2004, when Waterman was decided, we conclude that even if Officer Waters had violated the Constitution, he would be entitled to qualified immunity on the basis that the unconstitutionality of his actions was not clearly established at the time of the incident.[5]

III.

This case is no doubt a tragic one. It is possible, as theEstate contends, that Rodgers was attempting to surrender when he was engaged by the police dog and shot at by the officers. Even if this was the case, however, the circumstances presented to the officers at the outset of the encounter--the kidnapping, the high-speed chase, the wielding of a firearm and pointing it at the officers--gave them probable cause to believe otherwise, and to use deadly force to eliminate a serious and immediate threat to their lives. We therefore affirm the district court.

AFFIRMED

GREGORY, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that Deputy Farrow did not seize Rodgers within the meaning of the

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[5]In light of our conclusion that all of the officers involved in the incident are entitled to qualified immunity, the Estate's claims against Martin County Sheriff Keith Roach and against the City of Williamston necessarily fail. See *Kopf*, 942 F.2d at 269 (noting that municipal liability "is derivative of, but narrower than, the officers'").

Fourth Amendment. Accordingly, I concur that this officer is entitled to qualified immunity. However, because I cannot conclude as a matter of law that Officer Waters' deployment of his police dog was objectively reasonable under the circumstances, I dissent from the majority's holding that this defendant is also entitled to qualified immunity. "An attack by an unreasonably deployed police dog in the course of a seizure is a Fourth Amendment violation." *Vathekan v. Prince George's County,* 154 F.3d 173, 178 (4th Cir. 1998). As the majority recognizes, this court has twice addressed the issue of whether releasing a police dog without issuing a prior warning constituted unreasonable deployment. See id.; *Kopf v. Wing,* 942 F.2d 265 (4th Cir. 1991). In both cases, this court concluded that it did. In this case, it is undisputed that Officer Waters deployed his police dog against the decedent without issuing a prior warning. The majority, however, distinguishes the circumstances faced by Officer Waters in this case from those faced by the officers in Vathekan and Kopf, apparently on the grounds that Waters, unlike the officers in those cases, faced an imminent threat of harm. See Op. at 14-15. Accordingly, the majority concludes that it was not unreasonable for Waters to deploy his dog without prior warning. In my view, however, Waters did not face an imminent threat from Rodgers, and, thus, I cannot meaningfully distinguish the circumstances of this case from those of *Kopf.*

Although the majority provides a brief summary of the facts of Kopf, I believe that a more complete recitation is required. After receiving a radio report of an armed robbery, police officers initiated a high-speed pursuit of the vehicle in which the suspects were riding. *Kopf,* 942 F.2d at

266. Shortly thereafter, the suspects abruptly stopped their car and fled on foot. Id. After a cursory search of the vehicle failed to uncover the handgun used in the robbery, the officers reasonably concluded that the suspects likely were armed. Id. Although officers apprehended one of the three suspects during the ensuing foot pursuit, two suspects were able to conceal themselves behind a shed in the backyard of a residential neighborhood. Id. The suspects' hiding place "was an extremely narrow passage between the shed's wall and a fence." Id. After the officers located these defendants and surrounded the shed, one officer deployed a police dog into the passageway without a forewarning. Before the officers entered the passageway, the police dog severely mauled the suspects. See id. at 267.

In reviewing the propriety of the district court's grant of summary judgment in favor of the officer who had deployed the dog, this court concluded that he was not entitled to qualified immunity. Notwithstanding the officer's reasonable belief that the suspects were armed, the court concluded that the officer's failure to provide a warning (and therefore an opportunity to surrender) before deploying the dog was unreasonable. See id. at 268. As the majority recognizes, central to this conclusion was this court's finding that the suspects were surrounded and unable to escape. See id.

The majority relies on Officer Waters' knowledge of the circumstances leading up to the high speed pursuit as well as his statements regarding his perceptions of Rodgers once that pursuit ended to conclude that Waters acted reasonably in deploying his police dog without warning. However, the evidence in the record, when viewed in the

light most favorable to the decedent, portrays a scene indistinguishable from the one faced by the officers in *Kopf*.

The video of this incident indicates that several officers had positioned themselves around the parking lot before Rodgers exited his vehicle. Thus, as in Kopf, the decedent was surrounded and unable to escape. However, the majority concludes that Waters, unlike the officers in Kopf, faced an imminent threat of harm. In so doing, the majority points to Waters' assertions that he heard someone yell "Gun!", that he observed that Rodgers' right hand was out of view under his shirt, and that he (Waters) was so close to the decedent that he had no choice but to deploy his dog without warning. See Op. at 14-15. Viewing the evidence in the light most favorable to the decedent, however, I believe that the majority's reliance on these assertions is misguided. First, as the majority notes, Officer Waters gave two distinctly different versions of what he saw in Rodgers' hand before he deployed the dog. In his initial SBI statement taken shortly after the shooting, Waters asserted that he did not see Rodgers' right hand, but that "it may have been up under his shirt." J.A. 345. Contrarily, in a sworn affidavit, Waters later claimed that Rodgers had "advanced toward [him] with his handgun drawn in a threatening manner." J.A. 135. The patent inconsistency between these two statements undermines the credibility of Waters' assertions as to the imminent threat posed by the decedent.

Second, Officer Waters' and the other officers' actions, as portrayed on the video, provide strong evidence that Rodgers did not have a gun in his hand prior to being engaged by the dog Beginning at 1:51:01, Officer Waters,

without drawing his gun, can be seen rushing across the parking lot to within a few feet of where Rodgers is standing, hurling the dog towards him, and then continuing to advance until he is within inches of Rodgers. Four seconds later, at 1:51:05, Officer Waters, who is now standing in front of Rodgers watching the dog attack, begins to back away from Rodgers (and the dog). Officer Waters does not draw his gun until 1:51:06, when Rodgers, who at this point is desperately attempting to extricate the dog from his leg, reaches towards his waistband.

Had Waters actually heard his fellow officer shout "Gun!" or turned around to see Rodgers pointing a weapon at him, as he later claimed, it is doubtful that the officer would have approached and stood in front of Rodgers in such a vulnerable manner. Further, the video shows that neither Officer McFarlane nor Deputy Farrow has his gun raised at Rodgers as Officer Waters rushes towards him with the dog. Officer McFarlane, who is crouched on the ground with his gun in his right hand, does not raise his weapon at Rodgers until Waters releases the dog (1:51:03), and Deputy Farrow does not draw and aim his gun at Rodgers until five seconds after McFarlane (1:51:08). This is further evidence that Rodgers did not have a gun in his hand prior to Waters' release of the dog.

Finally, Waters' contention that he was so close to Rodgers that he had no choice but to deploy the dog without warning is belied by his actions and previous statement. As noted above, the video shows Waters advancing across the parking lot to within two or three feet of Rodgers before releasing the dog. Further, Waters initially asserted in his SBI statement that, while the high speed pursuit was still in progress, he had radioed the other officers to warn them that

he intended to deploy the dog against Rodgers once the pursuit ended. See J.A. 344. This statement further undermines Waters' claim that he made a split-second decision to deploy the dog based on his close proximity to Rodgers.

In sum, the video portrays a scene where a police officer deployed his dog without warning against a suspect who was completely surrounded and who, as evidenced by the officers' own actions, had not drawn his gun or otherwise endangered his--or his fellow officers'--safety. I, therefore, conclude that Officer Waters' deployment of the dog in this case is not readily distinguishable from the unlawful deployment in Kopf and would hold that Waters is not entitled to qualified immunity.*[6]

As the majority aptly notes, this is a tragic case. I, however, cannot join the majority in concluding that Rodgers' actions in bringing about this encounter justified Officer Waters' subsequent response. Ultimately, viewing the evidence in the light most favorable to the decedent, I believe a jury could conclude that Rodgers got out of his vehicle with empty hands in an attempt to surrender. Although it is undisputed that Rodgers eventually drew a gun, a jury could reasonably find that he did so only after he was attacked by the dog--and only then, in a desperate attempt to defend that attack. But for Officer Waters'

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[6]*The unlawfulness of deploying a dog without prior warning in these circumstances was clearly established by our decision in Kopf, which this court decided eleven years before the events giving rise to this case occurred. Thus, I would also conclude that the decedent has satisfied the second element for defeating qualified immunity as to Officer Waters.

unwarned deployment of the dog, this tragedy may have been averted.

I respectfully dissent in part.

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:03-CV-44-H(3)

ESTATE OF TARIK K. RODGERS,
by and through his administrators
MICHAEL RODGERS and
BRENDA RODGERS; and
BRENDA RODGERS and
MICHAEL RODGERS, as parents
of the decedent,

Plaintiffs,

v.

STEVE SMITH, individually and
in his official capacity as Chief
of Police for the City of Williamston
Police Department, North Carolina;
DONNIE PITTMAN, individually
and his official capacity as the
County Manager for martin County,
North Carolina; KEITH ROACH,
individually and his official
capacity as the Sheriff for Martin
County; WALTER J. FARROW III,
individually and in his official
capacity as a martin County Deputy
Sheriff; WILLIAM WATERS, JR.,
individually and in his official

capacity as a Williamston police officer; MELANIE COX, individually and in her official capacity as a Williamston, North Carolina police officer; CHARLIE BROWN, individually and in his official capacity as a Williamston, North Carolina police officer; ELVIS FORNEY III, individually and in his official capacity as a Williamston, North Carolina police officer; SCOTT MCFARLANE, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN EDMONDSON, individually and in his capacity as a Martin County Deputy Sheriff; BRIAN HARDISON, individually and in his official capacity as a Williamston, North Carolina police officer; TRAVIS COWAN, individually and in his capacity as a Williamston, North Carolina police officer; STACEY PIPPIN, individually and in his official capacity as a Williamston, North Carolina police officer; DAVID CROSS, individually and in his capacity as a Martin County Deputy Sheriff; the CITY OF

WILLIAMSTON, NORTH CAROLINA, and MARTIN COUNTY, NORTH CAROLINA,

Defendants.

ORDER

This matter is before the court on defendants' motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs have responded to these motions, and defendants have filed a reply to that response. This matter is ripe for adjudication.

STATEMENT OF THE CASE

Plaintiffs filed this action on April 4, 2003, alleging the following claims: (1) violations of constitutional and civil rights pursuant to 42 U.S.C. § 1983; (2) wrongful death; (3) conspiracy to violate constitutional rights pursuant to 42 U.S.C. § 1985; (4) gross negligence; and (5) assault, battery, and intentional infliction of emotional distress. This court issued an order on March 17, 2004, which dismissed all claims pursuant to Rule 12(b)(6) except those for violations of 42 U.S.C. § 1983 and state law claims for wrongful death, gross negligence, assault, battery, and intentional infliction of emotional distress, against the following defendants: the City of Williamston, Sheriff Roach in his individual and official capacities and defendants Smith, Farrow, Waters, Cox, Brown, /Forney, McFarlane, Emondson, Hardison, Cowan, Pippin, and Cross in their individual capacities.

Defendants Roach, Farrow, McFarlane, Edmondson, Pippin, and Cross ("Martin County defendants") filed a motion for summary judgment on December 1, 2004. Defendants Smith,

Waters, Cox, Brown, Corney, Hardison, Cowan, and the City of Williamston("Williamston defendants") filed a separate motion for summary judgment on that same day.

STATEMENT OF THE FACTS

The court states the evidence before the court in the light most favorable to the plaintiffs as follows. Decedent Tarik Rodgers was a black male, age 26, who lived across the street from the Martin County Governmental Center in the Town of Williamston, County of Martin, North Carolina. On April 14, 2002, at approximately 9:00 p.m., a sheriff's deputy served an ex parte domestic violence protective order on Rodgers. That order enjoined him from coming into contact with Angela Freeman, his long-time girlfriend and the mother of his two children. Freeman had sought the protective order in response to a pattern of threatening activity that Rodgers had directed at her, including verbal and physical threats and physical violence.

At approximately 10:00 p.m., Rodgers drove a Mitsubishi Diamante automobile to Freeman's house in order to discuss his parental rights under the protective order. Upset about receiving the protective order, Rodgers forcibly removed Freeman from her home at gunpoint with a Ruger pistol and drove her out to the area of Prison Camp Road in order to discuss the protective order. Defendant repeatedly shoved the fun in Freeman's face. Plaintiffs allege that Rodgers and Freeman determined that their problems resulted in part from a misunderstanding about the protective order. Rodgers stopped threatening her with the gun at that point.

Rodgers and Freeman had consensual sexual relations in the car. Rodgers expressed humiliation at what he had done and that he would not be able to face his children as a result. He asked Freeman to kill him, which she declined to do. Rodgers stated that

he "ought to pull up to the police and provoke them."

Rodgers then began driving back towards the home of Angela Freeman around midnight. After spotting a sheriff's patrol car, he began driving at a very high rate of speed, approximately 110 miles per hour, which attracted the attention of law enforcement. Deputy Sheriff Walter Farrow, one of the Martin County defendants, soon joined the chase, though he was off duty at the time. Williamston police officers William Waters, Elvis Forney, Melanie Cox, Charles Brown, and Roanoke-Chowan Narcotics Task Force Agent Scott McFarlane joined in the chase at the a later time. The officers were aware of a call made to the Williamston Police Department alerting them that a man of Rodgers' description had kidnaped Angela Freeman at gunpoint.

Towards the end of the chase, Rodgers hit the brakes while on Roberson Street in Williamston, which caused one of the police cars to crash into the rear of his vehicle. After the high speed chase, Rodgers stopped his car in a carwash parking lot facing Main Street. Law enforcement officers, including those named as defendants in this action, exited their vehicles and advanced towards Rodgers' car. Rodgers got out of the vehicle.[1] Sgt. Waters released the police dog, though it initially attached drug agent McFarlane by accident, causing minor injury. Sgt. Waters then retrieved the dog off of McFarlane and, without announcement, deployed the dog to subdue Rodgers.

Some of the Williamston officers then shot Rodgers eight times at close range. A gun was visible in Rodgers' hand during the

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[1]Plaintiffs characterize the evidence as supporting the allegation that Officer Brown forcibly and physically removed Rodgers from his vehicle. (Pls.' Mem. At 4.) The cited deposition testimony of Angela Freeman does not support that allegation.

end of the shooting from the police video taken by one of the patrol vehicles. Rodgers died from wounds that the gunshots caused.

COURT'S DISCUSSION

I. Standard of Review

Summary judgement is appropriate pursuant to Federal Rule of Civil Procedure 56 when no genuine issue of material fact exists and the moving party is entitled to judgement as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgement bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. V. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, see Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). As this court has stated, summary judgment is not a vehicle for the court to resolved disputed factual issues. See Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. See Anderson, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247-248. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in

ruling on this motion. Faircloth, 837 F. Supp. At 125.

II. Analysis of the Motion by the Martin County Defendants.

A. Fourth Amendment Violation Claim

Plaintiffs base their claim under 42 U.S.C. § 1983 for a violation of the Fourth Amendment to the U.S. Constitution on an allegation of excessive force used during the course of an arrest. See Graham v. Connor, 490 U.S. 386, 393-94 (1989); see also Saucier v. Katz, 533 U.S. 194, 197 (2001) (modifying the constitutional inquiry used by Graham). Specifically, they contend that unleashing the dog and using deadly force against Rodgers violated his right to be free from an unlawful seizure. Defendants respond that the use of force in that context did not approach Fourth Amendment boundaries, and that the police officers are entitled to the affirmative defense of qualified immunity.

When analyzing a qualified immunity defense with respect to § 1983 claims, courts are to resolve two issues: first, whether the plaintiff stated a violation of a constitutional right; and second, if so, whether that right was clearly established such that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). The purpose of qualified immunity is to "remove most civil liability actions, except those where th4e official clearly broke the law, from the legal process well in advance of the submission of facts to the jury. A police officer should prevail on an assertion of qualified immunity if a reasonable police officer possessing the same information could have believed that his conduct was lawful." Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991) (citations omitted).

The doctrine of qualified immunity provides that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Once an officer has raised the defense of qualified immunity, the plaintiff bears the burden of demonstrating the existence of the clearly established right that he claims was violated. Mitchell v. Rice, 954 F.2d 187, 190 (4th Cir. 1992). To carry its burden, the plaintiff should show that the specific right in issue has been "authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." Wilson v, Layne, 141 F.3d 111, 114 (4th Cir. 1998), aff'd, 526 U.S. 603 (1999),

Qualified immunity is not merely a defense to liability but "an 'entitlement not to stand trial' that would be 'effectively lost if a case is erroneously permitted to go to trial.'" Lopez v. Robinson, 914 F.2d 486, 489 (4th Cir. 1990) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)); see also Saucier v. Katz, 533 U.S. 194 (2001) (clarifying the distinction between reasonableness analysis under the Fourth Amendment and qualified immunity); Bennett v. Murphy, 274 F.3d 133, 136 (3rd Cir. 2001) (analyzing the doctrine clarified in Saucier). It is therefore a question of law for the court. Pachaly v. City of Lynchburg, 897 F.2d 723, 726 (4th Cir. 1990). Qualified immunity affords "ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986),

Thus, this court must determine whether the evidence proffered in this case, taken in the light most favorable to the plaintiffs, could show that the law enforcement officers violated decedent's clearly established Fourth Amendment rights and that no reasonable officer could have acted in the manner that the defendants did.

In evaluating an excessive force claim under the Fourth Amendment, courts apply an objective reasonableness standard to

determine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." Cox v. County of Prince William, 249 F.3d 295, 299 (4th Cir. 2001) (citations omitted).

As an initial matter, the court notes that the Martin County defendants have divided their memorandum in support into arguments for defendant Walter Farrow and arguments for the other five defendants. Plaintiffs' memorandum does not address individuals separately in a manner sufficient for the court to discern which defendant they allege was culpable for which action.[2]

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[2]Plaintiffs' memorandum is titled "Plaintiffs' Response to Williamston Defendants' Motion for Summary Judgment." They state, without elaborating, that the motion for summary judgment by the Martin County defendants was nto served according to the Federal Rules of Civil Procedure. They have not made a motion to strike, and ask that their memorandum apply equally to the summary judgment motion of the Martin County defendants. The Martin County defendants filed a Certificate of Service with their motion, signed by counsel Mark A. Davis. Without a clear motion or position by the plaintiffs as to the status of the summary judgment motion by the Martin County defendants, this court will not strike that motion and will consider the plaintiffs' memorandum and accompanying evidence to be opposing both the Williamston defendants' motion and the Martin County defendants' motion. The court notes that Robert A. Berry, to whom the Certificate of Service was directed, has been filing motions on behalf of the plaintiffs, who have changed attorneys at least once. (See Pls.' Mot. for Change of Local Counsel at 2; Order of Nov. 14, 2003.); Local Rule 83.1(g).

Defendants have also submitted affidavits that describe what each claims to have done during the incident.

1. Defendant Farrow

This court construes the evidence in the light most favorable to the plaintiff, but it does not ignore uncontradicted evidence that defendants have tendered. See, e.g., Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1987) (holding that summary judgment involves looking at the record submitted "as a whole"). Defendant Farrow's affidavit indicates that he discharged his weapon but did not actually shoot the decedent. (Aff. Of Farrow ¶ 6; Aff. of Trochum ¶¶ 3-8.) Plaintiffs have not come forth with any evidence that any bullets from Farrow's gun touched the decedent, nor have they constructed an argument that would impeach Farrow's story. For that reason, the court must turn to the question of whether Farrow's conduct even implicated the Fourth Amendment as being a "seizure." U.S. Const. Amend. IV.

A seizure occurs within the meaning of the Fourth Amendment only where a person is physically touched or restrained by a show of force. California v. Hodari D., 499 U.S. 621, 624 (1991). Using deadly force to detain someone does constitute a seizure under settled doctrine, id. at 644 (Stevens, J., dissenting), but merely using deadly force in an unsuccessful attempt to detain or subordinate a person does not constitute a seizure. Id. at 628-29.

In this case, there is no evidence that defendant Farrow's use of deadly force actually resulted in the decedent's eventual seizure, and plaintiffs have not offered a legal theory that would implicate liability against him under clearly established federal constitutional doctrine.

Accordingly, summary judgment as to defendant Farrow for the § 1983 claim is GRANTED.

2. Defendants McFarlane, Edmondson, Cross, Pippin and Roach

Defendants McFarlane, Edmondson, Cross, Pippin, and Roach all assert that they had no direct involvement in the use of deadly force against the decedent. (Aff. of McFarlane ¶ 9; Aff. of Emondson ¶ 3; Aff. of Cross ¶ 10; Aff. of Pippin ¶ 3; Aff. of Roach ¶ 3.) Thomas Trochum, a ballistics expert with the State Bureau of Investigation, has testified that no evidence exists which would link the above defendants to the use of deadly force. (Aff. of Trochum ¶¶ 3-8.)

Plaintiffs have not submitted evidence to the contrary, nor have they impeached the above evidence that these defendants did not seize the decedent with deadly force.

Accordingly, the summary judgment as tot he defendants McFarlane, Emondson, Cross, Pippin, and Roach for the § 1983 claim is GRANTED.

B. Claims for Gross Negligence, Wrongful Death, and Punitive Damages: Public Officer Immunity.

All Martin County defendants move for summary judgment as to the state law claims on the basis that North Carolina shields law enforcement officers from liability under the common law doctrine of public officer's immunity.

The doctrine of "public officer's immunity" under state law is parallel in nature to the doctrine of qualified immunity under federal law. Bailey v. State, 330 N.C. 227, 245, 412 S.E.2d 295, 306 (N.C. 1991), cert. Denied, 504 U.S. 911 (1992), overruled on other grounds, Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (N.C. 1998), The doctrine states that a public official, engaged in the performance of governmental duties involving judgment and discretion, may not be held personally liable for conduct "within the scope of his official authority." In the Matter of Grad v. Kaasa, 312

N.C. 310, 313, 321 S.E.2d 888, 890 (N.C. 1981); see also Smith v. Hefner, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (N.C. 1952) (immunity for negligence). Such officials may only be held liable for corrupt and malicious actions, or those outside the scope of their duties. In the Matter of Grad v. Kaasa, 312 N.C. at 313. A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty. Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (N.C. 1984). Furthermore, "[m]ere allegations of malice without more are insufficient to overcome a motion for summary judgment" based on public officer's immunity. Slade v. Vernon, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (N.C. App. 1993) (citing Nasco Equip, Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (N.C. 1976).

In this case, plaintiffs have not rebutted the arguments and evidence of the Martin County defendants that their actions did not constitute malicious conduct. Plaintiffs' response memorandum treats all defendants as an undifferentiated group with equal culpability. The Martin County defendants, on the other hand, sate that they did not shoot the decedent and did not release the K-9 officer on him. This contention goes unrebutted. There is no other factually supported allegation in the response which would connect the Martin County defendants to any malicious conduct - either allegations directed towards all defendants. Plaintiffs have essentially ignored the common law affirmative defense to the state law claims in their opposition memorandum.

In addition, the court notes that there is extensive evidence of reasonable fear on the part of law enforcement officers and defendant Farrow in particular. The evidence shows: there had been a call to the Williamston Police Department reporting Rodgers as having kidnaped Angela Freeman; Rodgers was driving at an extremely high rate of speed while being pursued by law enforcement; and, a Williamston police officer and defendant,

Charles Brow, had yelled "Gun!" as Rodgers exited the vehicle. Even disregarding the issue of whether Brown was reasonable to have alerted the other officers to the alleged possession of a firearm by Rodgers, such a circumstance, viewed from the perspective of Farrow, in the context of an attempted arrest such as this one, creates objectively reasonable fear for personal safely. N.C. Gen. Stat. § 15A-401(d).

The court does not need to reach the question of whether determining the facts surrounding a question of common law public officer's immunity is a matter for the court, which the parties have not briefed. Even with the facts construed in the light most favorable to the plaintiff, the above set of circumstances creates a situation where a reasonable police officer would consider himself and other in the vicinity at risk of imminent harm and justified in using deadly force. No reasonable fact-finder would conclude otherwise. In other words, defendant Farrow's actions, far from being malicious so as to penetrate common law officer immunity, were objectively not unreasonable. Such conduct does not support a claim for gross negligence, see Bullins v. Schmidt, 322 N.C. 580, 583, 360 S.E.2d 601, 603 (N.C. 1988) (requiring wanton or reckless conduct), or wrongful death under N.C. Gen. Stat. § 28A-18=2(a). Sigman v. Town of Chapel Hill, 161 F.2d 782, 789 (4th Cir. 1998) (objectively reasonable conduct by police officer defeats claim as a matter of law).

Accordingly, summary judgment as to all state law claims against the Martin County defendants is GRANTED.

III. Williamston Defendants

A. Fourth Amendment Violation Claim

The Williamston defendants raise substantially similar arguments as the Martin County defendants on their motion for summary judgment. The difference between the two groups is that

the fatal shots were fired by the Williamston officers, according to the uncontradicted affidavits and deposition testimony. In addition, the police dog was released from within the authority of the Williamston defendants. Because these events are what precipitated the substance of the lawsuit, the issues involved in the Williamston defendants' motion differ from the analysis in Part II.

As stated previously, the plaintiffs do not differentiate between defendants in their memorandum in opposition, nor do they assert a theory of joint and several liability or res ipsa loquitur which would allow a discussion of the police actions without regard tot he individuals' actions. With that in mind, the court will accept as uncontroverted the statements of defendants Waters, Brown, Farrow, and Forney in regards to which defendants took what action in terms of encouraging the decedent to get out of the car, unleashing the police dog, alerting law enforcement to the apparent existence of a deadly weapon by the decedent, and firing the fatal shots. Officer Brown commanded the decedent to exit the vehicle and yelled, "Gun!" Officer Walker unleashed the dog. Officer Waters fired shots at the decedent. Other Williamston police officers discharged their weapons, but the court is not prepared to list them definitively, given the state of the evidence as submitted.

1. Use of the Police Dog

The court turns first to the unleashing of the canine on the decedent. Plaintiff cites two Fourth Circuit cases, Vathekan v. Prince George's County, 154 F.3d 173 (4th Cir. 1998), and Kopf v. Wing, 954 F.2d 265 (4th Cir. 1991), in support of his contention that unleashing a police dog on a civilian without a prior warning is "objectively unreasonable," (Pls.' Mem. in Opp. At 14.) Defendants urge the court to distinguish the facts of this case from the cases that plaintiffs cite.

The apparent confusion results from the following statement

in Vathekan: "Fourth Circuit precedent existing in 1995 clearly established that failure to give a warning before releasing a police dog is objectively unreasonable in an excessive force context. Kopf, 942 F.2d at 266, 268." Vathekan, 154 F.3d at 179. Plaintiffs urge the court to regard this statement as a blanket rule on the use of police dogs. That would be inappropriate. Appellate opinions are not statutes to be applied rigidly accordingly to the rules of statutory construction. Cf. Engine Mars. Assn v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 124 S. Ct. 1756, 1761 (2004). Rather, they are guides which are binding on the district court but which are not legislative in nature.

Vathekan was citing Kopf in support of its holding that, where a police dog was unleashed in a house and eventually found and mangled a sleeping woman, summary judgment in favor of the defendant is inappropriate on Fourth Amendment grounds. Id. At 179. Kopf involved the allegedly unannounced unleashing of a dog on a fleeing suspect where there was not an allegation that the police were at risk of imminent harm. Kopf, 942 F.2d at 266. The relevant statement from the opinion in Kopf is as follows: "We believe that a jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog" attacks and subdues the suspect, where the suspect is already surrounded. Id. at 268.

Vathekan cited Kopf in reference to whether the given Fourth Amendment right involved was "clearly established: at the time, so as to abrogate qualified public immunity. Vathekan, 154 F.3d at 179. This court believes that Vathekan did not drastically extend the holding in Kopf so as to create a blanket per se rule, as plaintiffs read the case. Rather, it was citing Kopf to demonstrate that the unannounced use of a police dog on a suspect that did not manifest any immediate danger to surrounding persons could violate the Fourth Amendment. To the extent that the statement

appears to have been imprecisely drafted in the opinion, a careful reading of both Vathekan and Kopf, as well, as others discussing them, convincingly shows that no such rule arises from those cases. See, e.g., Szabla v. City of Brooklyn Park, 2004 U.S. Dist. LEXIS 9013, at 14 (D. Minn. May 18, 2004) (discussing Kopf and Vathekan and concluding that no per se rule arises from them). Moreover, to the extent that Vathekan decided issues far beyond the facts of the case, it would generally be dicta, especially viewed in light of the U.S. Supreme Court's holding that excessive force cases are inherently fact-intensive and require individualized determination based on the risks and circumstances that the law enforcement officer faced. Graham v. Connor, 490 U.S. 386, 396 (1989).

In this case, defendant Waters, the officer in charge of the police canine, faced the following scene, viewed from the uncontradicted facts. A call had been made to his department concerning an armed kidnaping by the decedent. (See, e.g., Aff. of Cross ¶ 4.) The police alert included the assertion that Rodgers had threatened to shoot Angela Freeman. (PLS.' Expert Witness Disclosure by Klotz at 3.) The decedent had engaged multiple law enforcement vehicles on an exceedingly high speed chase in excess of 100 miles per hour. The decedent got out of the car, also occupied by Angela Freeman, the person he hd been reported to have kidnaped. Another officer yelled, "Gun!". In those circumstances, the facts need not show that Waters saw this gun before unleashing the police dog to neutralize the supposed threat.

Even if the other officer wrongly identified a deadly weapon, the court will no second-guess an officer's use of deadly force in the above situation and must, instead, grant qualified public immunity protection from standing trial. See Sigman v. Town of Chapel Hill, 161 F.3d 782, 786 (4th Cir. 1998). A police officer is not required to "detect the presence of an object in a suspect's hands

before firing on him." Id. at 788. Where the events, viewed from the officer's perspective, show a considerable risk of harm to himself and others, the use of force to stabilize the situation is within the police officer's discretion under qualified public immunity. Id. The parties have not discussed whether the police dog should be considered deadly force, see Jarrett v. Town of Yarmouth, 331 F.3d 140, 2003 U.S. App. LEXIS 8606 (1st Cir. 2003), and such analysis is not necessary to this decision. Waters was entitled to use deadly force in his discretion. The risks he reasonably perceived immunize him from further Fourth Amendment scrutiny.

Plaintiffs vaguely assert that the police officers did not follow established procedures in utilizing the K-p officer. (PLS.' Mem. in Opp. At 16.) Presumably, this factual assertion refers to the equally vague statement in the expert witness disclosure of Robert W. Klotz that "it appears...the release of the canine was contrary to the department's directive on the use of the canine." (Report of Klotz at 4 n.4.) This allegation, without more, does not create an issue under federal law. There is no analysis as to how this apparent defect in following the established local procedure wou8ld call into question the use of a canine to counteract the reasonably perceived threat of deadly force by the decedent. In addition, a local police department does not heighten its own exposure to federal liability merely by establishing guidelines on the use of force which might be more exacting than the federal Fourth Amendment privilege.

Accordingly, defendant Waters' motion for summary judgment as to the claim for a violation of the Fourth Amendment and 42 U.S.C. § 1983 is GRANTED.

2. Use of Guns Resulting in Death

The use of deadly force by one or more of the other

Williamston officers, given the above situation, was similarly within their discretion. Where the officers are confronted with a situation involving a reported armed kidnapper who engaged the police on a high-speed chase and another officer signals the suspect's possession of a firearm, this court, given the Fourth Circuit case law analyzed in supra, should grant summary judgment on the grounds of qualified public immunity.

In this respect, the case before the court is very similar in its essential facts to McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994). In that case, probable cause to believe the decedent was armed and immediately dangerous constituted sufficient grounds to use lethal force against him. Id. at 1006-07. This case presents facts more favorable to the Williamston defendants, because here the decedent was actually found to have a gun, unlike in McLenagan, where the officer only reasonably believed the decedent was armed. While the facts of these cases are never precisely aligned with on another, this holding is in accordance with controlling case law in this circuit. Accord Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996); Sigman v. Town of chapel Hill, 161 F.3e 782, 786 (4th Cir. 1998); ''Wyche v. City of Franklinton, 837 F. Supp. 137 (E.D.N.C. 1993),

For these reasons, the motion for summary judgment by defendants Smith, Waters, Cox, Forney, Hardison, and Cowan - all Williamston defendants except Officer Brown - is GRANTED as to all federal rights claims under 42 U.S.C. § 1983 for the shooting of Tarik Rodgers.

3. Alert as to the Presence of a Deadly Weapon

The actions of Officer Brown - specifically, his yelling, "Gun!" - require additional analysis. Plaintiffs refer to the circumstances leading to the shooting of Tarik Rodgers as "Kafkaesque" (PLS.' Mem. in Opp. At 17) in that, according to

their version of the events, the police officers themselves instigated a confusing situation that precipitated the perceived need to use deadly force. The evidence is viewed in the plaintiffs' favor. Therefore, the uncontradicted fact that triggered and justified the release of the dog and the shooting of the decedent was Brown's alert as to the presence of a weapon. Officer Brown acted partly as the eyes for the other officers, and so if he falsely and maliciously alerted the other officers to the presence of a deadly weapon so as to invite them to shoot Rodgers, his qualified public immunity would clearly be abrogated.

In this motion for summary judgment, defendants are not entitled to their factual assertion that the officers all saw the gun before killing the decedent. Affidavits that state that the officers saw a gun prior to discharging a weapon are subject to the jury determining their credibility. The video, on the other hand, is conclusive as to the events it captured. Unless the plaintiffs have some articulable and factually supported means to impeach its authenticity. Accord Stewart v. Prince George's County, 2003 WL 22179057, at *1, *3, 75 Fed. Appx. 198 (4th Cir. Sep. 23, 2003).

Plaintiffs base their scenario on two factually untenable propositions. First, they inaccurately cite and interpret the deposition testimony of Angela Freeman, who was in the passenger's seat during the altercation. Their contention is that Freeman's testimony supports the proposition that "[d]ecedent exited his vehicle without a gun and with both hands raised.: (PLS.' Mem. in Opp. At 9.) Freeman's deposition, rather, states the following:

Q: And when he got out of the car you don't know one way or the other whether he had the gun, right?

A: When he got out of the car he had nothing in his hands, his hands were up.

Q: But you don't know whether he had the gun on him or not?

A: I never saw the gun.

Q: So you don't know whether he had it with him or not?

A: No.

(Dep. of Freeman at 42.) In other words, Freeman stated that she did not see a gun with him when he got out of the car.

Second, plaintiffs dispute that the video shows a gun in the hands of the decedent and view the matter as a "genuine issue" of fact, Fed. R. Div. P. 56, for jury deliberation. This court does not agree. Under the United State Supreme Court's interpretation of the standard governing summary judgment, a court is not required to suspend all disbelief regarding an external factual matter. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 , 587 (1985); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1985). Summary judgment is designed to narrow the issues to those about which reasonable people could differ. To that extent, the court must defer to the province of the jury but need not go outside the bounds of a reasonable assessment of the evidence.

In this case, the video shows that a gun-shaped object flew from the hands of the decedent as he fell to the ground. The uncut version of the video shows an officer picking up the object after the conclusion of the altercation, which shows more clearly that the object was in the shape of the fund and appeared to be metallic. Additionally, the police reports of the incident refer to the object as a fun. Lastly, all that is required to confirm the reasonableness of the defendants' perceptions about the object is that it appeared to be a gun, not its actual nature or whether it could be fired.

Furthermore, plaintiffs cannot create a material factual dispute from the minor differences in recollection regarding the color of the gun in the officers' depositions and affidavits. The fact

that one officer referred to it s silver in nature whereas another recalled it to be black, when the gun was both silver and black, it not a material issue of fact.

The court is therefore left with the following facts in the light most favorable to the plaintiffs that a reasonable jury could so find. Rodgers was reported to have kidnaped someone with a weapon. His car was positively identified and engaged the police officers on a high-speed chase. Rodgers stopped, precipitating a car crash. He got out of the car with his hands up, and Freeman, who was in the car, did not see a gun in his hands.[3] An officer yelled "Gun!" and a police dog was unleashed. Rodgers was soon shot multiple times. During the course of the shooting, the video shows that he emerged from behind the car with a gun in his right hand.

The only remaining question is how the gun got into his hands in the few moments between when he got out of the car and when he emerged from behind the police vehicle into view from the police video camera, a camera which showed him holding a fun-shaped object. On this point, the plaintiffs bear the burden to proffer some coherent factual explanation that would support a finding of liability. See Celotex Corp., 477 U.S. at 325 (1986) (holding that the plaintiff bears the ultimate burden of showing a genuine factual issue for trial). Plaintiffs have not done so. Their principal factual assertion is that the decedent did not have the gun when he exited the car, and he did not have a gun, or anything that would justify the use of deadly force, when he was videotaped being shot a few moments later. That interpretation of the video does not survive reasonable scrutiny, as stated above. The court is

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[3]The part of the Freeman deposition which discusses this issue concerns her testimony on the S.B.I. interview record, taken at 8:15 a.m. on April 15, 2002, the morning after the incident. (Martin County Defs.' Mot. For Summ. J. Ex. A.)

therefore left with no plausible scenario for the jury to evaluate.

Likewise, plaintiffs have not given any alternative explanation for Officer Brown's having yelled "Gun!". Given that qualified public immunity is a right not to stand trial, plaintiffs must come forth with some plausible and factually supported inference that would penetrate his immunity and impeach the evidence, given that he has offered a reasonable version of the facts. The parties have not briefed the issue of which party bears the burden of persuasion and the burden of production regarding qualified public immunity, but the court does not need to reach that issue. Even if defendant Brown bears both burdens, he has carried them.

Accordingly, defendant Charles Brown's motion for summary judgment as to the claim for a violation of the Fourth Amendment pursuant to Title 42 U.S.C. § 1983 is GRANTED.

B. State Law Public Officer Immunity

The analysis under North Carolina common law for the Williamston defendants does not differ significantly from that for the Martin County defendants. The Williamston defendants will not be liable as a mater of law for any of their actions within their legal authority, so long as such acts were not malicious. In the Matter of Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (N.C. 1981),

In this case, the plaintiffs have not come forth with any evidence that would suggest malicious intent, nor have they advanced any plausible inference of malicious intent. Allegations in the complaint, standing alone, are not sufficient to withstand a properly supported motion for summary judgment. Celotex Corp., 477 U.S. at 325 (1986).

Accordingly, the Williamston defendants' motion for summary judgment as to the claims for assault, battery, gross negligence, and intentional infliction of emotional distress is

GRANTED.

CONCLUSION

For the foregoing reasons, the court GRANTS the motion for summary judgment by defendants Roach, Farrow, McFarlane, Edmondson, Pippin, Cross, Smith Waters, Cox, Brown, Forney, Hardison, Cowan, and the City of Williamston as to the claims for violation of 42 U.S.C. § 1983, wrongful death, gross negligence, assault, battery, and intentional infliction of emotional distress.

The clerk is directed to close his case.
This 1st day of March, 2005

MALCOLM HOWARD
United States District Judge

At Greenville, NC
#28

IN THE *UNITED STATED DISTRICT COURT*
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:03-CV-44-H(3)

ESTATE OF TARIK K. RODGERS,
by and through his administrators
MICHAEL RODGERS and
BRENDA RODGERS; and
BRENDA RODGERS and
MICHAEL RODGERS, as parents
of the decedent,

Plaintiffs, **ORDER**

v.

STEVE SMITH, et al.,

Defendants.

This matter is before the court on defendants' partial motions to dismiss. Plaintiffs have responded and defendants have replied. This matter is ripe for consideration.

STATEMENT OF THE CASE

Plaintiffs filed this action on April 4, 2003, alleging the following claims: (1) violations of constitutional and civil rights pursuant to 42 U.S.C. § 1983; (2) wrongful death; (3) conspiracy to violate constitutional rights pursuant to 42 U.S.C. § 1985; (4) gross negligence; and (5) assault, battery, and intentional infliction of

emotional distress.[1] These claims stem from an incident in which members of the Martin County Sheriff's Department and the Williamston Police Department allegedly shot and killed Tarik K. Rodgers ("Rodgers"). On April 17, 2003, the Martin County defendants[2] filed the present partial motion to dismiss. On May 30, 2003, the Williamston defendants[3] filed a partial motion to dismiss.

STATEMENT OF THE FACTS

Plaintiffs; complaint alleges the following facts. Decedent Rodgers was a twenty-six year old black male at the time of the events in the complaint. On April 24, 2002, a domestic violence protective order was served on Rodgers. Shortly after receiving the protective order, Rodgers went to the home of Angela Freeman, the mother of his two daughters, in order to discuss his parental rights. That night, Rodgers and Freeman left Freeman's residence together in Rodgers' vehicle. At about 12:30 a.m., Freeman exited Rodgers'

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[1]Though plaintiffs' fifth claim for relief is titled "Punitive Damages", the body of this claim states that defendants committed assault, battery, and outrage. The court will treat this claim as alleging the torts of assault, battery, and intentional infliction of emotional distress, with a request for punitive damages.

[2]The Martin County defendants include Martin County, County Manager Pittman, Sheriff Roach, and Deputy Sheriffs Farrow, McFarland, Edmondson, Pippin, and Cross.

[3]The Williamston defendants are the remaining defendants. The Williamston defendants include the City of Williamston, Chief of Police Smith, and Police Officers Waters, Cox, Brown, Forney, Hardison, and Cowan.

vehicle to place a telephone call from a nearby business to Rodgers' parents' residence, and then returned to the car. At some point between 12:30 and 1:30 a.m., members of the Williamston Police Department and the Martin County Sheriff's Department engaged in a high speed pursuit of Rodgers' vehicle. Officer Waters' vehicle collided with Rodgers' vehicle. Officer Brown approached Rodgers' vehicle and used his service revolver to knock on the driver's side window. When Rodgers opened the door to his vehicle, Brown attempted to remove Rodgers from his vehicle by grabbing Rodgers' clothing. Rodgers was wearing his seat belt at the time, and when Rodgers reached to disengage his seat belt, Brown shouted "gun". Rodgers exited his vehicle with his hands up and without a weapon of any kind. Waters then deployed a police dog, who attacked Rodgers. Officer Waters and Deputy Sheriffs Farrow and McFarland drew their weapons suddenly and without warning, and fired shots at point blank range into Rodgers' head and torso, striking him eight times. The shots perforated Rodgers' heart, brain, and lungs, killing him. Afterwards, the officers and deputies moved Rodgers' corpse out of the range of the video cameras located on the police cars, and handcuffed the corpse. They also moved evidence present at the scene. Shortly after Rodgers' death, the officers and deputies were seen talking and laughing in a group.

Plaintiffs allege that the shooting and other unlawful acts were racially motivated. They claim that the Police Department and the Sheriff's Department have established and condones a pattern and practice of treating black citizens with more contempt and disrespect than they treat white citizens.

COURT'S DISCUSSION

I. Standard of Review

In reviewing a motion to dismiss, the court should view the allegations of the complaint in the light most favorable to the plaintiff. See De Sole v. United States, 947 F.2d 1169, 1171 (4th Cir. 1991). The court must accept the factual allegations of the complaint but is not bound with regard to its legal conclusions. See United Mine Workers v. Wellmore Coal Corp., 609 F.2d 1083, 1085 (4th Cir. 1979). Plaintiffs are entitled to reasonable inferences by the court in ruling on a motion to dismiss. See Mylan Lab. V. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). However, where a plaintiff's claim against a defendant consists entirely of conclusory allegations unsupported by factual assertions, such pleading fails even the liberal standard of Rule 12(b)(6) and must be dismissed. Cushing v. City of Chicago, 3 F.3d 1156 (7th Cir. 1993).

II. Analysis

A. Claims against Martin County and County Manager Pittman

Plaintiff's complaint names Martin County and County Manager Pittman as defendants in addition to Sheriff Roach of Martin County. Plaintiff argues that the county and the county manager should be held liable for inadequate training of the Martin County defendants. A county or county official may be held liable only for acts over which the county or official has final policy-making authority. See City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988), cited in Worrell v. Bedsole, No. CA-94-778-5-F, 1997 WL 153830 at *5 (4th Cir. April 3, 1997); see also Olvera v. Edmundson, 151 F. Supp. 2d 700, 705 (W.D.N.C. 2001); Little v. Smith, 114 F. Supp. 2d 437, 446 (W.D.N.C. 2000). Whether a

county or county official has final policy-making authority in a specific area is a question of state law. City of St. Louis v. Praprotnik, 485 U.S. at 123. In North Carolina, the sheriff retains the exclusive responsibility for training and supervising employees in the Sheriff's Department. See N.C. Gen. Stat. § 153A-103 (stating that the sheriff "has the exclusive right to hire, discharge, and supervise the employees in his office"); Clark v. Burke County, 450 S.E.2d 747, 749 (N.C. Ct. App. 1994) (stating that "the control of employees hired by the sheriff is vested exclusively in the sheriff"); Olivera v. Edmundson, 151 F. Supp. 2d at 705 (stating that "[b]ecause training and supervision constitutes 'personnel decisions' for purposes of determining who possesses policymaking authority, the County is entitled to dismissal"). The sheriff may not delegate this authority to another person or entity. N.C. Gen. Stat. § 162-24.

In this case, it is clear that neither Martin County nor the County Manager Donnie Pittman has policy-making authority over the training and supervision of employees of the Sheriff's Department. Thus the court will grant defendants' motion to dismiss as to these defendants.

B. Claims Against the Chief of Police, the Police Officers, and the Deputy Sheriff in Their Official Capacities

In addition to naming the City of Williamston and Sheriff Roach of Martin County as defendants, plaintiffs' complaint names the police chief of Williamston, several Williamston police officers, and several Martin County deputy sheriffs. Defendants argue that the court should dismiss the claims against these officials because such claims are redundant. While individual capacity suits seek to impose personal liability upon a government officer for actions he takes under color of state law, official capacity suits against an

officer are generally treated as suits against the governmental entity of which the officer is an agent, Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Monell v. Dep't of Social Servs., 436 U.S. 658, 690 n.55 (1978) *stating that suits against officers in their official capacities "represent only another way of pleading an action against an entity of which as officer is an agent").

In Jackson v. Granville County, the court noted that under North Carolina law, the deputy sheriffs are employees of the sheriff. Jackson v. Granville County, No. 5:02-CV-899-BO(3) (E.D.N.C. March 4, 2003). It then dismissed the claims against the deputy sheriffs, stating that "[b]ecause the sheriff...is already a named defendant in this action, Plaintiff's claims against the deputies in their official capacities are redundant and unnecessary to the relief sought by Plaintiffs." Id. Similarly, in Davidson v. Wightman, this court found that claims against the police chief in his official capacity are properly treated as claims against the city. Davidson v. Wightman, No. 4:01-CV-79-H4 (E.D.N.C. Sept. 4, 2001). As in Jackson and Davison, the claims against the deputy sheriffs, chief of police, and police officers in their official capacities are redundant and unnecessary and the court therefore will dismiss these claims.

C. Claims Against Deputy Sheriffs Edmondson, Pippin, and Cross in Their Individual Capacities

Defendants argue that plaintiffs have failed to state a claim against deputy sheriffs Edmondson, Pippin, and Cross, in their individual capacities, in that plaintiffs have failed to allege any specific wrongful conduct by these defendants. In paragraphs 42, 61, 62, 65, 66, 67, and 98 of plaintiffs' complaint, plaintiffs seem to allege that all defendants participated in the high speed chase, in handcuffing and moving the decedent's body, and in disturbing the physical evidence at the scene. While a more specific showing

might be required to prevail at trial or to withstand summary judgment plaintiffs' allegations are adequate at this stage. The court will therefore deny defendants' motion to dismiss as these defendants.

D. Section 19 8 Claims

Defendants argue that the court should dismiss plaintiffs' claims alleging violations of 42 U.S.C. § 1985, conspiracy to interfere with civil rights, because defendants' allegations are vague and conclusory. The court agrees.

In order to state a claim under 42 U.S.C. § 1985, a plaintiff must prove: "(1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidious discriminatory animus to (3) deprive plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy." Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995). For claims under 42 U.S.C. § 1985, a plaintiff must plead specific facts in a nonconclusory fashion to withstand a motion to dismiss. Id. The Fourth Circuit has rarely found that a plaintiff has set forth sufficient facts to establish a conspiracy claim. Id.

Plaintiffs allege in a conclusory manner that defendants were motivated by racial bias and by the police department's and the sheriff's department's policies of racial discrimination. However, plaintiffs do not set forth any facts or forecast any evidence that would tend to support the allegations that the shooting of Rodgers was motivated by racial prejudice. See Gooden v. Howard County, Md., 954 F.2d 960, 970 (4th Cir. 1992) (finding that the mere statement that the officers were white and the plaintiff was black was insufficient to support plaintiff's § 1985 claim); Thomas v. Roach, 165 F.3d 137, 147 (2d Cir. 1999) (affirming

summary judgment dismissal of § 1985 claims against officers who shot arrestee because plaintiffs failed to sufficiently allege facts showing that the officers selected their course of action based on arrestee's race or facts showing the existence of an agreement).

Furthermore, in order to state a claim for a conspiracy under § 1985, a plaintiff "must show an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights." Simmons v. Poe, 47 F.3d at 1376. "Without such a meeting of the minds, the independent acts of two or more wrongdoers do not amount to a conspiracy." Sales v. Murray, 862 F. Supp. 1511, 1517 (W.D. Va. 1994) (citing Murdaugh Volkswagen, Inc. V. First Nat'l Bank of S.C., 639 F.2d 1073, 1076 (4th Cir. 1981)). The facts of plaintiffs' complaint, taken as true, suggest that two or three officers shot Rodgers and that other officers also engaged in unlawful acts. None of the events discussed in the complaint suggest that the defendants in any agreed to violate Rodgers' rights. Thus, the "meeting of the minds" element is lacking. Plaintiffs'' allegation that the defendants conspired against Rodgers is conclusory and insufficient as a matter of law to state a conspiracy claim under § 1985.

E. Claims by Michael and Brenda Rodgers as Parents of the Decedent

Defendants argue that only the personal representatives of a decedent's estate may pursue a civil action on behalf of the decedent, and that the court therefore should dismiss the claims by Michael and Brenda Rodgers in their capacities as the decedent's parents. The court agrees.

North Carolina law determines the survivability of causes of action under 42 U.S.C. § 1985 and under state law. Dean v. Shirer, 547 F.2d 227, 229 (4th Cir. 1976). Under N.C. Gen. Stat. § 28A-18-1(a), all claims that exist in favor of a decedent survive to the

personal representative or collector of his estate. Similarly, N.C. Gen. Stat. § 28A-18-3 provides that all actions brought by the personal representatives of an estate "upon any cause of action or right to which the estate of the decedent is the real party in interest" must be brought by them in their representative capacity. Though the real parties in interest as to the wrongful death claim are the beneficiaries of decedent's estate, North Carolina law provides that only the representative of the decedent's estate has the right to bring action for the wrongful death of the decedent. See N.C. Gen. Stat. § 28A-18-2 (stating that actions for the wrongful death of a person are to be brought by the personal representative or collector of the decedent); Burcl v. N.C. Baptist Hospital, Inc., 293 S.E.2d 85, 87 (N.C. 1982) (stating that "[p]arents may not maintain (wrongful death actions in their individual capacities for deaths of their children"); Bowen v. Constructors Equip. Mental Co., 196 S.E.2d 789, 803 (N.C. 1973) (stating that though a wrongful death action may be brought only by the representative of the decedent's estate, the real parties in interest are those entitled to recover under the Intestate Succession Act). As North Carolina law is clear that only the personal representatives of a decedent's estate may bring an action on behalf of the decedent, the court will dismiss all claims by Michael and Brenda Rodgers in their capacities as parent of the decedent.

CONCLUSION

For the foregoing reasons, the court hereby GRANTS Defendants' motions to dismiss as to the following claims:

1. All claims against defendants Martin County and Pittman;
2. All claims against defendants Smith, Farrow, Waters, Cox, Brown, Forney, McFarland, Edmondson, Hardison, Cowan, Pippin, and Cross, in their official capacities;
3. All claims pursuant to 42 U.S.C. § 1985; and
4. All claims by Michael and Brenda Rodgers as parents of the decedent.

The court hereby DENIES defendants' motions to dismiss as to Deputy Sheriffs Edmondson, Pippin, and Cross in their individual capacities.

The claims that remain before this court for adjudication are those brought by the estate of Tarik K. Rodgers for violations of 42 U.S.C. § 1983, wrongful death, gross negligence, assault, battery, and intentional infliction of emotional distress, against the following defendants: the City of Williamston, Sheriff Roach in his individual and official capacities, and Smith, Farrow, waters, Cox Brown, Forney, McFarland, Edmondson, Hardison, Cowan Pippin, and Cross in their individual capacities

This 16th day of March, 2004

MALCOLM J. HOWARD
United States District Judge

At Greenvile, NC
#1

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OCT 25 2006
OFFICE OF THE CLERK

06-762

In The Supreme Court of the United States

ESTATE OF TARIK K. RODGERS, by and through his administrators MICHAEL RODGERS and BRENDA RODGERS, and BRENDA RODGERS and MICHAEL RODGERS, as Parents of the Decedent,
Petitioners,

v.

STEVE SMITH, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gary S. Parsons
Counsel of Record
Gavin B. Parsons
D. Martin Warf
TROUTMAN SANDERS LLP
Post Office Box 1351
Raleigh, North Carolina 27602-1351
(919) 212-4110

James R. Morgan, Jr.
Counsel of Record
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
One West Fourth Street
Winston-Salem, North Carolina 27101
(336) 721-3710

Counsel for Respondents

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

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STATEMENT OF FACTS

The following facts are pertinent to this Court's determination of the Petition and were carefully not mentioned by Plaintiffs in their Petition. On April 11, 2002, Angela Freeman obtained a restraining order against Tarik Rodgers, the father of her children. (SJA at 24; JA at 113)[1]. During the three years preceding the restraining order, Rodgers had physically abused Ms. Freeman several times. (JA at 172-73, 88). Prior to the entry of the restraining order, Rodgers and Ms. Freeman had a fight in which Rodgers told Ms. Freeman that "if he couldn't have her, no one would" and threatened to "get her." (JA at 89, 100). Rodgers – who weighed around 250 pounds – subsequently proceeded to try to run her off the road, got her in a chokehold around her neck, accused her of having a relationship with another man, and then headbutted and kicked her in the stomach after knocking her onto the ground. (JA at 89-90, 170-71, 173, 185).

On the evening of April 14, 2002, at approximately 9:30 p.m., Rodgers was served with a domestic violence protective order obtained by Ms. Freeman. (JA at 90, 173-174). Within a half hour, Rodgers entered Ms. Freeman's home with a gun in his hand. *See id.* In front of their two children, Rodgers pushed the barrel of his gun (a Ruger pistol) into the left side of Ms. Freeman's neck, told

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[1] References to JA are to the Joint Appendix on file with the Fourth Circuit Court of Appeals. References to SJA are to the Supplemental Joint Appendix on file with the Fourth Circuit Court of Appeals.

Freeman's cousin not to call the police, and took Ms. Freeman out the back door at gunpoint, to his car. *See id.*

Rodgers drove down a dirt road and told Ms. Freeman that he planned to "off her and then off himself." (JA at 91, 174-176). As they sat in the car, Rodgers repeatedly shoved the gun in her face and into her ribs. *See id.* He then asked Ms. Freeman to perform oral sex on him. *See id.* Rodgers then had sexual intercourse with Ms. Freeman. *See id.* Afterward, Rodgers began driving the car again and asked Ms. Freeman if she would shoot him if he gave her his gun, and Ms. Freeman said no. (JA 92, 176-179). Rodgers then said he ought to pull up to the police and provoke them. *See id.*

They passed a Sheriff's Department vehicle, and Rodgers began accelerating to speeds of approximately 110 miler per hour. (JA at 93, 179-184). Rodgers drove into the downtown area of Williamston and, following a lengthy pursuit by law enforcement officers, slammed on his brakes and slid off the street into in a carwash parking lot, at which point his vehicle came to a stop. *See id.* Rodgers then looked at Ms. Freeman and said "This is it." *See id.*

Shortly after the kidnapping that evening, the Williamston Police Department received a call reporting that Ms. Freeman had been kidnapped at gunpoint from her home. (JA at 128). Law enforcement officers responding to the call were informed that Rodgers was armed and dangerous, and this information was broadcast over the police

radio. (JA at 129-130). Officer Waters and the other William[illegible] Defendants were aware that the Williams[illegible] Police Department had received a call that Angela Freeman had been kidnapped at gunpoint from her home by her boyfriend Tarik Rodgers some time after 9:30 p.m. April 14, 2002. (JA 133-134 ¶¶ 3-5). They were told that prior to kidnapping Ms. Freeman, Rodgers had been served with a domestic violence protective order and became upset because he thought he could not see his children anymore. (JA 134 ¶ 6). One of the witnesses to the kidnapping informed the Williamston Defendants that Rodgers was armed with a Ruger-type handgun, possibly a nine millimeter pistol; that Rodgers had threatened the occupants of Ms. Freeman's home; that Rodgers stated he was not going down without a fight, and that Rodgers threatened the witness, telling her not to call the police or he would kill Ms. Freeman and then return to the home to kill the witness. (JA 129 ¶¶ 5-10). A radio broadcast was also made to the Williamston Defendants informing them to be on the lookout for Rodgers because he was considered armed and dangerous. (JA 130 ¶ 12).

Waters and the Williamston Defendants were informed that Martin County Sheriff's Deputies had attempted to stop Rodgers' car, but he refused to stop and led them on a high-speed chase through Martin County, all the while holding Ms. Freeman captive in his car. (JA 134 ¶ 7). Williamston Officers Waters, Brown, Forney, and Cox became involved in the vehicular pursuit of Rodgers on the evening of April 14, 2002 and early morning April 15, 2002, and Rodgers continually refused to stop for numerous

law enforcement officers with their blue lights engaged. (JA 134 ¶ 8; JA 139 ¶¶ 7-8; JA 130 ¶ 13).

Along with various officers from the Williamston Police Department, Deputies Walter Farrow, Scott McFarlane, and David Cross of the Martin County Sheriff's Department joined in the pursuit of Rodgers' vehicle. (SJA at 25, 34, 38-39). After Rodgers' vehicle came to a stop, Farrow parked his car in the car wash parking lot near Rodgers' vehicle. (SJA 39). He saw Williamston Police Officers Charlie Brown and William Waters run towards the driver's side of Rodgers' vehicle and yell to Rodgers "Get out of the car, get out of the car!" *See id.*

After Rodgers ignored repeated verbal commands to get out of the vehicle, Brown opened the driver's side of Rodgers' car and repeated these commands, which Rodgers continued to ignore. (JA at 139). Brown then reached into the vehicle, grabbed Rodgers by the shirt, and attempted to pull him out of the vehicle. Rodgers resisted these efforts, pulling himself back into his vehicle, reaching toward the center console area with his right hand, and grabbing a handgun. (JA at 140). Brown yelled "Gun!" and retreated toward the rear of Rodgers' vehicle. *See id.*

Officer Waters heard someone shout "gun" as officers attempted to get Rodgers out of his vehicle. (JA 134 ¶ 11). Officer Waters, along with the other Williamston Defendants present at the scene just after Rodgers exited his vehicle were closest to Rodgers. (JA 134 ¶¶ 12-13; JA 140 ¶¶ 15-16, 19; JA

145 ¶13). All these officers saw Rodgers outside his vehicle brandishing a pistol. *See id.* Upon observing Rodgers outside his vehicle waving a handgun in a threatening manner, these Williamston Defendants felt in fear for their own lives, and thought Rodgers was a danger to everyone present at the scene. (JA 135 ¶¶ 14-16; JA 140 ¶¶ 20-21; JA 145-146 ¶¶ 14-15). After Rodgers got out of the car, he advanced toward Waters with his gun pointed toward Waters. (JA at 134-35; SJA at 39). Waters released a police canine in an effort to protect himself from Rodgers, but Rodgers was able to resist the canine and continued to point his gun at Waters. (JA at 135, 140).

Farrow heard Brown yell "Gun!" and then saw Brown running backwards. (SJA at 39). Farrow yelled at Rodgers: "Put the gun down. Get down!" Rodgers ignored these commands. *See id.* Farrow heard Waters fire several shots at Rodgers, but Rodgers remained standing with his gun pointed toward the officers. (SJA at 39; JA at 135).

Farrow then saw Rodgers turn and point the gun toward Farrow. (SJA at 39). Rodgers was very close to Farrow at that time. *See id.* Farrow then fired his weapon (a Beretta .40 caliber pistol) in Rodgers' direction because he feared for his life and believed that Rodgers intended to shoot him. *See id.* Rodgers did not appear to be fazed and remained standing. *See id.* Waters then fired several more shots at Rodgers which struck him. *See id.* Only then - for the first time – did Rodgers fall to the ground. (SJA at 39; JA at 135). When he hit the ground, Rodgers' handgun fell out of his right hand

and landed a short distance from his body. (DVD)[2]. After the shooting, Martin County Deputy Sheriff Walter Farrow recovered Rodgers' pistol from where it had fallen on the ground and placed it on the hood of his patrol car. (JA 146 ¶ 17-18; DVD).

These critical facts were completely ignored by the Petitioners. The majority agreed that Rodgers held a firearm when he engaged the law enforcement officers at the scene. (Pet.App. 14). Although the dissent disagreed with certain facts and the majority's holding, it agreed that, "...it is undisputed that Rodgers eventually drew a gun..." (Pet.App. 23)(emphasis added).

Another key fact Plaintiffs omit was that the District Court's January 15, 2004 order setting limitations on discovery was a consent order agreed to by counsel for Plaintiffs, and it did not stay all discovery of the Martin County Defendants and Williamston Defendants. Rather, it merely limited discovery to issues related to qualified immunity. Plaintiffs also misstate the District Court's opinion in their Statement of the Case, saying "having divested itself of pendant jurisdiction, the court dismissed all of the remaining state law claims." To the contrary, the District Court dismissed the state law claims on their merits. (JA 497-500, 512).

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[2] Reference to the DVD is to a video that was filed with the Fourth Circuit Court of Appeals and authenticated by affidavits in the Joint Appendix.

REASONS THE COURT SHOULD DENY THE WRIT

Standard of Review

As the Court is no doubt well aware:

Review of a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision of a state court of last resort; or has so far departed from accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this

> Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

United States Supreme Court, Rule 10 (emphasis added).

This case was carefully reviewed by the United States Court of Appeals for the Fourth Circuit, and a reasoned application of well-stated rules of law yielded a decision against Petitioners they now claim is "inconsistent" and "short-sighted." Other than mischaracterizing the record, however, Petitioners identify no areas in which the Fourth Circuit's decision conflicts with those of other circuits or diverges from proper judicial review.

Farrow Did Not Seize Rodgers

Petitioners first suggest that the District Court and later the Fourth Circuit erred by granting and affirming summary judgment for the Respondents by holding that Rodgers was not seized by Deputy Farrow who fired at Rodgers but whose bullets never struck him. Petitioners fail to point to any case law that meets the standard of review for this Court to grant their Petition. Petitioners presumptively cite this Court's opinion in *Brower v. County of Inyo*, 489 U.S. 593 (1989), as support for

their assertion that *Rodgers* "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power[.]" United States Supreme Court, Rule 10. However this is completely misplaced.

Brower is an apt example of a circuit split warranting Supreme Court intervention. In that case, the Ninth Circuit had held that the method by which police officers used a roadblock did not effect a seizure under the Fourth Amendment and a claimant's complaint therefore failed to state a claim for relief. *See Brower v. County of Inyo*, 817 F.2d 540 (9th Cir. 1987), *rev'd*, 489 U.S. 593 (1989).

The exact opposite conclusion was reached in *Jamison v. Shaw*, 772 F.2d 1205 (5th Cir. 1985), an opinion by the Fifth Circuit two years earlier, that determined that a claimant who contested the method by which police officers had used a roadblock did state a claim for which relief could be granted. The facts of both cases were by all material counts identical—in both cases a decedent was killed by making contact with a police roadblock set up in the dark, in an area of a road where visibility was limited and police "blinded" the driver with their lights moments before the crash—but the legal analysis of each court was wholly divergent.

Thus, in that scenario, if presented with the identical facts, the Ninth Circuit would not allow a constitutional cause of action against the police officers and the Fifth Circuit would, both doing so as a matter of law. That is quintessentially the judicial

conflict that a writ of certiorari was designed to address—and did.

Petitioners here have failed to reference any case indistinguishable on its facts that is legally divergent from the District Court and Circuit Court's analysis. That glaring absence is strong evidence that this Court's review is unnecessary.

In addition, courts from other jurisdictions have repeatedly rejected the Petitioners' argument that it is "irrelevant" whether an officer's shots actually strike the subject in determining whether a seizure has occurred. *See Bella v. Chamberlain*, 24 F.3d 1251, 1255-56 (10th Cir. 1994) (shots fired by officer that struck victim's helicopter did not result in seizure under Fourth Amendment because, while constituting an assertion of authority, the shots did not cause the victim to submit to authority or succeed in stopping him); *Cole v. Bone*, 993 F.2d 1328, 1332-33 (8th Cir. 1993) (shots fired at suspect's truck that did not hit him were not seizures because they failed to produce a stop); *Carr v. Tatangelo*, 156 F. Supp. 2d 1369, 1377 (M.D. Ga. 2001) ("[S]hooting at a person does not constitute a seizure within the meaning of the Fourth Amendment unless the person is actually shot (i.e. is physically touched) or is stopped in what he is doing (i.e. submits to the show of authority)"; *Parris v. Town of Alexander City*, 45 F. Supp. 2d 1295, 1302 (M.D. Ala. 1999) (shooting at suspect is not seizure unless person is actually shot or shot causes fleeing person to submit to officer's show of authority). The District Court and the Fourth Circuit were not in conflict with other federal courts, and did not depart from the

accepted and usual course of judicial proceedings; and therefore, Petitioners' claims regarding Fourth Amendment seizure do not merit consideration by this Court.

District Court Properly Granted Qualified Immunity To Waters Regarding Release of the Police Canine

In an apparent attempt to show at least one other circuit court in conflict with the Fourth Circuit's decision here regarding the lower courts' grant of qualified immunity to Officers Waters and/or other Williamston Respondents regarding the release of Waters' police canine, Petitioners cite *Priester v. City of Riviera Beach*, 208 F.3d 919, 926-27 (11th Cir. 2000), in the last sentence of their petition. This case falls dramatically short of establishing a conflict with other courts required for this Court's review. Instead *Priester* is completely consistent with *Rodgers*. The two read together are clear examples of how the same reasonable and objective analysis of law regarding excessive force under the Fourth Amendment can, on application of the law to different facts, produce two distinct but congruent outcomes.

In *Priester*, the Eleventh Circuit affirmed the district court's denial of a defendant police officer's motion for judgment notwithstanding the verdict based on the officers' qualified immunity. There, the officers allowed a police canine to attack for two minutes an unarmed, cooperative, potential suspect—identified just on tracking a scent for

twenty minutes—in a $20.00 robbery of snacks. *Priester*, 208 F.3d at 927. A quick review of the facts of this case quickly dispels any purported conflict.

In this case Rodgers kidnapped his former girlfriend at gunpoint in front of his two children, incited a high-speed chase by refusing to stop for law enforcement officers, brandished a weapon at law enforcement officers upon exiting his car, refused to surrender to a police canine, and continued to point a handgun at officers during an altercation with a police canine. (Pet.App 4-8). Unlike the claimant in *Priester*, Rodgers was captured on videotape armed with a handgun which was recovered, again on camera following the shooting. (Pet.App 14-16)(DVD).

The *Priester* court was not presented with an armed claimant who posed a threat to the lives of the law enforcement officers and others. This is precisely why the Fourth Circuit distinguished the present case from both *Kopf v. Wing*, 932 F.2d 265 (4th Cir. 1991) and *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998). Here, Officer Waters faced a man he had been informed was armed both by radio during the chase and by Officer Brown who shouted "Gun!" There is little doubt that if each circuit were presented with the facts of the other, their decisions would be in accord. Both *Rodgers* and *Priester* followed the same method of analysis and processed each set of facts through same rules of law. Differing outcomes in this scenario are precisely what justice requires and why *Rodgers* merits no further review.

District Court Properly Granted Qualified Immunity To Defendant Officers Regarding Use of Force and Remaining Defendants on Derivative Liability

Petitioners fail to cite any authority to support their contention that summary judgment for Defendants on Plaintiffs' use of force claims was improper under Fourth Circuit caselaw or under any other federal appellate decisions. The Fourth Circuit followed a legally and factually analogous published opinion in *Elliott v. Leavitt* 99 F.3d 640 (4th Cir. 1996). The Fourth Circuit in *Elliott* explained its ruling thusly:

> We reverse the judgment of the district court, finding that the officers' use of deadly force in response to an obvious, serious, and immediate threat to their safety was reasonable under *Graham v. Connor*...The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.

Elliott, 99 F.3d at 641 (emphasis added). The Court further explained that:

> [T]he critical point...is precisely that [the suspect] was threatening the lives of [the officers]. The Fourth Amendment does not require police officers to wait until a suspect shoots to

> confirm that a serious threat of harm exists.
>
> No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat to his or her life. As *Greenidge* and *Slattery* illustrate, the Fourth Circuit does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, of the nature of the threat or the suspect's intent to cause them harm—the Constitution does not require that certitude precede the act of self protection.

Id. 99 F.3d at 643-644 (emphasis added).

As the *Rodgers* Court noted,

> [T]he uncontradicted record evidence establishes that at some point after initially emerging from the car, Rodgers acquired his firearm, either by reaching back into the car and grabbing it (as Officer Brown's testimony would indicate), or by some other means (such as removing it from the waistband of his pants, an inference consistent with Freeman's testimony). Further the

> uncontradicted record evidence indicates that Officer Brown shouted "Gun!" and, critically, that Rodgers waved the weapon around and pointed it direct at Officer Waters and Deputy Farrow. Indeed, Officer Waters testified that he saw Rodgers point the firearm at him after Rodgers had been engaged by the police dog. When Officer Waters was presented with these circumstances, he also knew that Rodgers had abducted his estranged girlfriend at gunpoint, had led officers on a lengthy high-speed chase, and had caused one of the pursuing vehicles to crash into his own. We therefore hold that Officer Waters' use of deadly force was not objectively unreasonable in light of the circumstances know to him at the time of the shooting.

(Pet.App. 14-15).

Rather than argue a misapplication of the law, Petitioners continue to reargue their version of the facts of the case without the support of any published opinions. This attempt for another bite at the proverbial apple should therefore fail, because it does not comport with the applicable standard of review.

District Court Properly Granted Summary Judgment on Petitioners' State Law Claims

Petitioners also argue without support from any published authority that the dismissal of their state law claims was improper. Because those claims are not generally reviewable by this Court absent clear error, and Petitioners have demonstrated none, these claims do not merit discussion. *Haring v. Prosise*, 462 U.S. 360, 314, n.8, 103 S.Ct. 2368 (1983); *Leavitt v. Jane L.*, 518 U.S. 137, 144-145; 116 S.Ct. 2068 (1996).

CONCLUSION

Petitioners have failed to meet the standard of review to justify taking this Court's time and resources to reconsider Petitioners' claims. They cannot arguably show any way in which the Fourth Circuit's opinion conflicts with other federal Circuits or exceeded the bounds of the accepted and usual course of judicial proceedings. Petitioners' claims do not merit additional review.

This the 25 day of October, 2005.

/s/ Gary S. Parsons
Gary S. Parsons
N.C. State Bar No. 7955
Gavin B. Parsons
N.C. State Bar No. 28013
D. Martin Warf
N.C. State Bar No. 32982
TROUTMAN SANDERS LLP
Post Office Box 1351
Raleigh, NC 27602-1351
Telephone No. (919) 212-4110

Attorneys for the Williamston Respondents

/s/ James R. Morgan, Jr.
James R. Morgan, Jr.
N.C. State Bar No. 12496
Womble Carlyle Sandridge & Rice
A Professional Limited Liability Company
One West Fourth Street
Winston-Salem, NC 27101
Telephone No. (336) 721-3710

Attorney for the Martin County Respondents